No. 04-1131

Title:	Terry L. Whitman, Petitioner v. Department of Transportation, et al.
Docketed:	February 24, 2005
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(03-35303)
Decision Date:	August 30, 2004
Rehearing Denied:	November 24, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 22 2005	Petition for a writ of certiorari filed. (Response due March 28, 2005)
Mar 23 2005	Order extending time to file response to petition to and including April 27, 2005.
Apr 15 2005	Order further extending time to file response to petition to and including May 25, 2005.
May 19 2005	Order further extending time to file response to petition to and including June 6, 2005.
Jun 6 2005	Brief of respondents Department of Transportation, et al. filed. (Distributed)
Jun 7 2005	DISTRIBUTED for Conference of June 23, 2005.
Jun 9 2005	Reply of petitioner Terry L. Whitman filed. (Distributed)
Jun 27 2005	Petition GRANTED.
Jul 21 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 1, 2005.
Jul 25 2005	SET FOR ARGUMENT on December 5, 2005.
Aug 5 2005	CIRCULATED.
Aug 25 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Aug 26 2005	Brief amicus curiae of Allen Dotson filed.
Sep 1 2005	Brief amici curiae of American Federation of Government Employees, et al. filed. (Distributed)
Sep 1 2005	Brief amicus curiae of National Treasury Employees Union filed. (Distributed)
Sep 1 2005	Brief of petitioner Terry L. Whitman filed. (Distributed)
Sep 1 2005	Joint appendix filed. (Distributed)
Sep 20 2005	Extension of time within which to file the respondents' brief on the merits to and including October 18, 2005.

Oct 11 2005	Motion of National Treasury Employees Union for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 18 2005	Further extension of time within which to file respondents' brief on the merits to and including October 20, 2005.
Oct 20 2005	Brief of respondents Department of Transportation, et al. filed. (Distributed)
Oct 27 2005	Motion of American Federation of Government Employees, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Oct 28 2005	Record received from U.S.C.A. - 9th Circuit. (1 envelope)
Oct 31 2005	Motion of National Treasury Employees Union for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Oct 31 2005	Record received from U.S.D.C. for Dist.of Alaska. (1 envelope)
Nov 7 2005	Motion of American Federation of Government Employees, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Nov 23 2005	Reply of petitioner Terry L. Whitman filed. (Distributed)
Dec 5 2005	Argued. For petitioner: Pamela S. Karlan, Stanford, Cal. For respondents: Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

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(1)

No. 04-__

IN THE

Supreme Court of the United States

Terry L. Whitman,

Petitioner,

v.

U.S. Department of Transportation; Norman Y. Mineta, U.S. Secretary of Transportation.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 5 U.S.C. 7121(a)'s provision that the negotiated grievance procedures of a federal collective bargaining agreement be "the exclusive *administrative* procedures" to resolve grievances precludes an employee from seeking direct *judicial* redress when he would otherwise have an independent basis for judicial review of his claims.

2. Whether the Civil Service Reform Act, 5 U.S.C. 7101 *et seq.*, precludes federal courts from granting equitable relief for constitutional claims brought by federal employees against their employer.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT 2
REASONS FOR GRANTING THE WRIT 6
I. The Ninth Circuit's Denial of Subject Matter Jurisdiction Over Federal Employees' Employment-Related Statutory Claims Conflicts With the Decisions of Other Circuits and Is Wrong on the Merits. 6
A. The Courts of Appeals Are Divided Over the Availability of a Judicial Remedy for Federal Employees' Statutory Claims 6
B. The Circuit Conflict Is Untenable Given the Disuniformities It Creates in Federal Personnel Law. 10
C. Section 7121(a) Does Not Strip Federal Courts of Jurisdiction over Federal Statutory and Constitutional Claims. 12
II. This Court Should Also Grant Certiorari Because the Ninth Circuit's Refusal to Provide Equitable Relief Conflicts With the Holdings of Other Circuits and Is Wrong on the Merits. 16
A. The Circuits Are Also Divided Over Whether the CSRA Precludes Equitable Remedies for Constitutional Violations. 16
B. The CSRA Does Not Preclude Courts from Granting Equitable Relief for Constitutional Violations 21
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Addison-Taylor v. *United States*, 73 Fed. Appx. 418 (CAFC 2003) 7
Asgrow Seed Co. v. *Winterboer*, 513 U.S. 179 (1995) 12
Asociacion de Empleados del Area Canalera (ASEDAC) v. *Panama Canal Commission*, 329 F.3d 1235 (CA11 2003) 4, 8, 10
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 23
Barhorst v. *Marsh*, 765 F. Supp. 995 (E.D. Mo. 1991) 17
Bell v. *Hood*, 327 U.S. 678 (1946) 22
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) ..... passim
Blue v. *Widnall*, 162 F.3d 541 (CA9 1998) 9, 19
Bowen v. *Michigan Acad. of Family Physicians*, 476 U.S. 667 (1986) 25
Bryant v. *Cheney*, 924 F.2d 525 (CA4 1991) 16, 17, 20
Bush v. *Lucas*, 462 U.S. 367 (1983) ..... passim
Carter v. *Gibbs*, 909 F.2d 1452 (CAFC) (en banc), cert. denied, 498 U.S. 811 (1990) 7, 14, 15
Cooper Industries, Inc. v. *Aviall Services, Inc.*, 125 S. Ct. 577 (2004) 13
Corr. Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) 22
Duncan v. *Walker*, 533 U.S. 167 (2001) 13
Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869) 23
Ex Parte Young, 209 U.S. 123 (1908) 22
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 24
Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 23
Georgia v. *Ashcroft*, 539 U.S. 461 (2003) 13
Gibson v. *Berryhill*, 411 U.S. 564 (1973) 13

Golt v. *United States*, 186 F.3d 1158 (CA9 1999) 5, 9
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 24, 26
Hardison v. *Cohen*, 375 F.3d 1262 (CA11 2004) 16, 17, 20, 21
Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000) 12
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 23
Hohn v. *United States*, 524 U.S. 236 (1998) 13
Hubbard v. *EPA*, 809 F.2d 1 (CADC 1986) ..... passim
Johnson v. *Robison*, 415 U.S. 361 (1974) 25
Lombardi v. *Small Bus. Admin.*, 889 F.2d 959 (CA10 1989) 16, 19, 22
Lorillard v. *Pons*, 434 U.S. 575 (1978) 14
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 18
Massey v. *Helman*, 35 F. Supp. 2d 1110 (C.D. Ill. 1999) 17
Mitchum v. *Hurt*, 73 F.3d 30 (CA3 1995) 17, 18, 20, 23
Mount Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 22
Mudge v. *United States*, 308 F.3d 1220 (CAFC 2002) .. passim
O'Connor v. *United States*, 308 F.3d 1233 (CAFC 2002) 7
Osborn v. *United States Bank*, 22 U.S. (9 Wheat.) 738 (1824) 22
Paige v. *Cisneros*, 91 F.3d 40 (CA7 1996) 17
Pennoyer v. *McConnaughy*, 140 U.S. 1 (1891) 22
Pinar v. *Dole*, 747 F.2d 899 (CA4 1984) 16, 17
Public Citizen v. *U.S. Dep't of Justice*, 491 U.S. 440 (1989) 15
Russell v. *United States Dep't of the Army*, 191 F.3d 1016 (CA9 1999) 4, 5
Salinas v. *United States*, 522 U.S. 52 (1997) 14
Saul v. *United States*, 928 F.2d 829 (CA9 1991) 16, 20, 22
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 19, 22

Spagnola v. *Mathis*, 859 F.2d 223 (CADC 1988) (per curiam) 18, 19
Stephens v. *Dep't of Health & Hum. Svcs.*, 901 F.2d 1571 (CA11 1990) 16
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 22
Tiltti v. *Weise*, 155 F.3d 596 (CA2 1998) 17
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 13
United States v. *Hohri*, 482 U.S. 64 (1987) 11
Veit v. *Heckler*, 746 F.2d 508 (CA9 1984) 3, 5, 9, 19
Wallace v. *Jaffree*, 472 U.S. 38 (1985) 14
Weatherford v. *Dole*, 763 F.2d 392 (CA10 1985) 19
Webster v. *Doe*, 486 U.S. 592 (1988) 25
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) ... 23, 25
West v. *Gibson*, 527 U.S. 212 (1999) 13

Statutes

5 U.S.C. 2302(b) 15
5 U.S.C. 7101 et seq. 2
5 U.S.C. 7103(a)(9)(A) 4
5 U.S.C. 7103(a)(9)(C)(ii) 4
5 U.S.C. 7121 ..... passim
5 U.S.C. 7121(a) ..... passim
5 U.S.C. 7121(a)(1) ..... passim
5 U.S.C. 7121(a)(2) 8
28 U.S.C. 1254(1) 1
28 U.S.C. 1295(a)(2) 11
28 U.S.C. 1295(a)(3) 11
28 U.S.C. 1346 11
28 U.S.C. 1346(b) 11
28 U.S.C. 1491 11
49 U.S.C. 5331(d)(8) 3
49 U.S.C. 40122(g) 2

49 U.S.C. 40122(g)(2)(A) 15
49 U.S.C. 40122(g)(2)(H) 15
49 U.S.C. 45104 ..... 1, 2
49 U.S.C. 45104(8) 3

Other Authorities

BLACK'S LAW DICTIONARY (6th ed. 1990) 12
RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) 25
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Federal Employees Fairness Act of 1994, H.R. Rep. No. 103-599 (1994) 15
H.R. 2970, To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv., 103d Cong. (1993) 15
OFFICE OF PERSONNEL MGT., *Table of Federal Civilian Employment Ranked by State with Trend Changes, available at* http://www.opm.gov/feddata/geograph/2002/index.asp 10
Robert G. Vaughn, *Federal Employment Decisions of the Federal Circuit*, 36 AM. U. L. REV. 825 (1987) 11
Elizabeth A. Wells, Note, *Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?*, 90 MICH. L. REV. 2612 (1992) 20, 21
Who Can Be Protected By the OSC From Prohibited Personnel Practices?, available at www.osc.gov/ppp.htm#q2 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Terry Whitman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-11a) is published at 382 F.3d 938. The district court's memorandum granting respondent's motion to dismiss (Pet. App. 12a-15a), dated February 26, 2003, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. The court of appeals denied rehearing and rehearing en banc on November 24, 2004. See Pet. App. 16a. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

5 U.S.C. 7121(a) provides:

(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

49 U.S.C. 45104 provides, in relevant part:

In carrying out section 45102 of this title, the Administrator of the Federal Aviation Administration shall develop requirements that –

* * *

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no

employee is harassed by being treated differently from other employees in similar circumstances.

STATEMENT

Petitioner alleges that the Federal Aviation Administration ("FAA") violated 49 U.S.C. 45104(8) and his constitutional right to privacy by failing to establish randomized drug testing procedures and subjecting him to drug tests at a rate far exceeding that of similarly situated co-workers. The district court dismissed the suit for lack of subject matter jurisdiction, reasoning that the Civil Service Reform Act ("CSRA") required him to grieve his allegations according to the procedures outlined in his Collective Bargaining Agreement ("CBA"). Expressly rejecting contrary holdings of the Federal and Eleventh Circuits, the Ninth Circuit affirmed, holding that petitioner's action was precluded because the CSRA "does not expressly confer jurisdiction" over claims subject to a CBA's negotiated grievance procedures.

1. The Civil Service Reform Act, 5 U.S.C. 7101 et seq., establishes a general system of administrative procedures for addressing federal employee grievances.[1] Section 7121(a)(1) requires that federal employee CBAs "shall provide procedures for the settlement of grievances" and that (subject to certain exceptions not relevant here) "the procedures shall be the exclusive administrative procedures for resolving grievances which fall with [the CBA's] coverage."

2. Petitioner Terry Whitman works as an Air Traffic Assistant for the FAA, an agency within the United States Department of Transportation ("DOT"), and is thus subject to

[1] Petitioner's employment is governed by the FAA Personnel Management System ("FAA System"). See Pet. App. 4a. The CSRA does not apply directly to the FAA System, but certain portions, including Section 7121(a), are made applicable to the FAA System by 49 U.S.C. 40122(g). *Ibid.*; see also FAA System, Ch. 5, § 1(a).

random drug and alcohol testing. See Pet. App. 2a. Believing that he had been selected for testing three times more often than other employees, petitioner filed a claim in June 2001 with the Federal Labor Relations Authority ("FLRA"). He alleged that the FAA's testing program "does not guarantee individual rights" and, moreover, that "the randomness of the selection process is suspect." *Id.* 3a. Finding that petitioner's claim did not fall within its jurisdiction because it did not involve protected union activity, the FLRA dismissed his claim and subsequently denied his appeal. See *id.* 13a.

3. In May 2002, petitioner filed this suit in the U.S. District Court for the District of Alaska. In his complaint, petitioner alleged that the FAA was testing him in a non-random manner in violation of his rights under 49 U.S.C. 5331(d)(8) (now codified at 49 U.S.C. 45104(8)). Between 1987 (when the testing was initiated) and 2000, for example, petitioner was tested eleven times, while two similarly situated employees were tested just once; most similarly situated employees were tested only four times. See Compl. 3. In an amended complaint, petitioner contended that the non-random testing procedures also violated his constitutional right to privacy. He sought injunctive relief in the form of a "survey of other employees to determine how often they were tested" and an order to "remedy the situation" if it was determined that petitioner was not being tested randomly. Pet. App. 3a.

Unless stripped of jurisdiction to hear the case by some other provision of law, the district court had jurisdiction over petitioner's claim under, *inter alia*, the Administrative Procedure Act and the federal court's inherent jurisdiction to enjoin unconstitutional conduct. The district court granted respondents' motion to dismiss, finding that it had no jurisdiction in light of the CSRA. Pet. App. 14a (citing *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984)) (internal quotation marks omitted). The court held that it lacked jurisdiction not only over petitioner's statutory claim but also

over his constitutional claim, relying upon Ninth Circuit precedent holding that "the CSRA preempts *Bivens* actions *and* other suits for constitutional violations arising from governmental personnel actions." Pet. App. 14a & n.19 (citing *Russell* v. *United States Dep't of the Army*, 191 F.3d 1016, 1020 (CA9 1999)).

4. On appeal, the Ninth Circuit affirmed. It began by concluding that petitioner's claim falls within the meaning of "grievance" under the CSRA, 5 U.S.C. 7103(a)(9)(A); *id.* § 7103(a)(9)(C)(ii), and that he could have grieved his allegations pursuant to the CBA. Pet. App. 5a-6a.

The court of appeals determined that 5 U.S.C. 7121(a)(1) precluded petitioner from seeking direct judicial review of his claims. As an initial matter, it recognized that both the Federal Circuit, in *Mudge* v. *United States*, 308 F.3d 1220 (2002), and the Eleventh Circuit, in *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Commission*, 329 F.3d 1235 (2003), had held that, notwithstanding Section 7121(a)(1), a federal employee has the "right to seek a judicial remedy for employment grievances subject to the negotiated procedures contained in his or her CBA." Pet. App. 6a-7a (quoting *Mudge*, 308 F.3d at 1227) (internal quotation marks omitted). Those courts had rested their holdings on "[t]he plain language of § 7121(a)(1)," which had previously referred only to "exclusive procedures" but was amended in 1994 to provide that the negotiated grievance procedures "shall be the exclusive administrative procedures for resolving" covered grievances. The Federal and Eleventh Circuits found that text to be "unambiguous": "[t]he plain language of amended § 7121(a)(1) does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress." *Mudge*, 308 F.3d at 1230; see also *ASEDAC*, 329 F.3d at 1240 (adopting Federal Circuit's reasoning in *Mudge*).

But the Ninth Circuit squarely rejected both the rationale and result of those cases, which it deemed "inconsistent with

the law of our circuit." Pet. App. 9a. Instead, it began by emphasizing that "[f]ederal courts 'have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere.'" Pet. App. 7a (quoting *Veit*, 746 F.2d at 511). Relying on *Golt* v. *United States*, 186 F.3d 1158 (1999), in which the Ninth Circuit had construed the post-amendment version of Section 7121(a)(1) but had "never expressly addressed what effect, if any, the 1994 amendment" would have on the statute's meaning, Pet. App. 7a, the court of appeals concluded that "'under the law of this circuit, 5 U.S.C. § 7121(a)(1) *preempts* employment related claims which fall within collective bargaining agreements' because the statute does not expressly provide for federal court jurisdiction over such claims." *Ibid.* (quoting *Golt*, 186 F.3d at 1159) (emphasis added). "Because the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction," it continued, "*Golt* correctly held that amended § 7121(a)(1) establishes no more than an exclusive administrative remedy." *Id.* 8a. Further, although the court of appeals did not expressly ratify the district court's holding that "the CSRA preempts *Bivens* actions *and* other suits for constitutional violations arising from governmental personnel actions," *id.* 14a & n.19, it impliedly did so by favorably citing Ninth Circuit precedent that had so held, *id.* 9a (citing *Russell*, 191 F.3d at 1019-20). The court of appeals thus affirmed the district court's dismissal of petitioner's claim.

5. Petitioner timely sought rehearing and rehearing en banc. His petition was denied. Pet. App. 16a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Denial of Subject Matter Jurisdiction Over Federal Employees' Statutory Claims Conflicts With the Decisions of Other Circuits and Is Wrong on the Merits.

A. The Courts of Appeals Are Divided Over the Availability of a Judicial Remedy for Federal Employees' Statutory Claims.

Certiorari is warranted because the Ninth Circuit's construction of Section 7121(a) avowedly conflicts with the holding of two other circuits that the statute does not preclude a federal employee from bringing statutory claims directly in federal court. Indeed, the United States expressly acknowledged that a decision in its favor would create such a circuit split. See U.S. C.A. Br. 40 (entire section devoted to urging the court of appeals not to "Follow the Federal and Eleventh Circuits' Mistaken Rulings Concerning the Availability of Federal Court Review of Claims That Are Grievable Under the Civil Service Reform Act").

1. The Federal and Eleventh Circuits construe Section 7121(a)(1), as amended in 1994, to "limit the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her CBA," but not to "restrict an employee's right to seek a judicial remedy for such grievances." *Mudge*, 308 F.3d at 1228. The Federal Circuit in *Mudge* considered an FAA employee's claim for back pay. The Court of Federal Claims had dismissed the action, holding that Section 7121(a)(1) deprived it of jurisdiction. The Federal Circuit reversed, holding that Congress's addition of the word "administrative" to Section 7121(a) was a "change in the law that limited the scope of § 7121(a)(1)'s exclusivity provision," thereby removing the

bar to judicial review that had existed under the previous version of the statute. *Mudge*, 308 F.3d at 1224.[2]

The Federal Circuit carefully analyzed the meaning of each term in the text of Section 7121(a)(1). It concluded that its decision in *Carter* v. *Gibbs*, 909 F.2d 1452 (CAFC) (en banc), cert. denied, 498 U.S. 811 (1990), dismissing a federal employee's claim on the ground that Section 7121(a)(1) "limited the resolution of * * * grievances to the negotiated procedures set forth in an employee's CBA," *Mudge*, 308 F.3d at 1223, had been overturned by the 1994 amendment. The court reasoned that because the "common meaning" of "administrative" is distinct from "judicial," the phrase "exclusive administrative procedure" in Section 7121(a)(1) "limits the *administrative* resolution of a federal employee's grievances [but] does not restrict an employee's right to seek a *judicial* remedy for such grievance." See *Mudge*, 308 F.3d at 1228 (emphasis added).

Recognizing that the issue was "a contested matter with compelling and well-reasoned arguments on both sides," the Federal Circuit carefully considered – but ultimately rejected – each of the government's arguments that Section 7121(a) precluded judicial review. It first addressed the government's suggestion that the 1994 amendment merely clarified that – subject to certain exceptions not at issue in either *Mudge* or this case – an aggrieved employee's only remedy is the negotiated grievance procedures provided in her CBA. The court decided that the "subsection * * * mean[s] what it says" and that "administrative" means that the exclusion does not extend to judicial procedures. *Mudge*, 308 F.3d at 1228-29.

Next, the court considered the government's contention that the 1994 amendment left the substantive meaning of Section 7121(a)(1) unchanged, both because it was labeled a

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[2] The Federal Circuit subsequently reaffirmed *Mudge* in *O'Connor* v. *United States*, 308 F.3d 1233, 1239-40 (2002), and *Addison-Taylor* v. *United States*, 73 Fed. Appx. 418 (2003).

"Technical and Conforming Amendment" and because the legislative history does not reflect such an intent. The court dismissed those arguments based on what it regarded as the the plain text. See *id.* at 1229-30 (statute "does not provide two 'logical interpretations' * * * from which this court can choose").

The court then turned to the government's contention that the plaintiff's interpretation of Section 7121(a)(1) as preserving judicial remedies rendered superfluous Section 7121(a)(2), which provides that "any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement." That language, the government asserted, exists only to allow unions to preserve judicial remedies for certain types of grievances by excluding them from the CBA's grievance procedures. The court pointed out that Section 7121(a)(2) serves additional functions beyond preserving judicial review, namely "(1) foreclosing access to negotiated procedures; and (2) directing certain matters to alternative administrative channels." *Id.* at 1230-31.

Finally, the Federal Circuit rejected the government's argument that its reading would contradict the congressional preference for CBA grievance procedures and "disrupt[] the balance of procedural rights" set out in the CSRA. *Id.* at 1231-32. The court explained that such concerns could not work "to the exclusion of the plain language of the statute" and that, in any event, its ruling left the CBA procedure as the sole *administrative* procedure, reflecting precisely the "balance of procedural rights" Congress codified in the statute. *Ibid.*

The Eleventh Circuit subsequently adopted the Federal Circuit's reasoning and holding in toto in *Asociacion de Empleados del Area Canalera* (*ASEDAC*) v. *Panama Canal Commission*, 329 F.3d 1235 (2003), a case involving a group of Panama Canal Commission employees claiming back pay and other benefits. As in *Mudge* and this case, the district

court had dismissed the suit for lack of subject matter jurisdiction pursuant to Section 7121(a)(1), and the defendant Panama Canal Commission made arguments similar to those made by the government in *Mudge*. After reexamining the *Mudge* analysis point-by-point, the Eleventh Circuit "[found] the Federal Circuit's reasoning in *Mudge* on all these points to be persuasive and adopt[ed] that reasoning," *id.* at 1241, holding that a federal employee had the "right to bring his or her claims directly in federal court," *id.* at 1239.

2. In holding that Section 7121(a) deprives federal employees of the ability to seek judicial review of claims covered by negotiated grievance procedures, the decision below conflicts with both the holding and the reasoning of the Federal and Eleventh Circuits. While those circuits had rested their holdings on the fact that Section 7121(a)(1) does not expressly *exclude* judicial remedies, see, *e.g.*, *Mudge*, 308 F.3d at 1228, the Ninth Circuit took precisely the opposite approach, and rested its analysis on the fact that Section 7121(a) does not expressly *authorize* jurisdiction under the CSRA over claims such as petitioner's. See Pet. App. 9a-10a (citing *Golt* v. *United States*, 186 F.3d 1158, 1159 (CA9 1999)) (emphasis added). As a result, unlike the Federal and Eleventh Circuits, the Ninth Circuit treated the 1994 insertion of the word "administrative" into Section 7121(a) as having virtually no bearing on the question because "the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction." Pet. App. 8a. Thus, it continued to adhere to its own precedent interpreting the pre-amendment language. See *id.* 7a-8a (citing *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984)).[3]

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[3] Relying on the same Ninth Circuit precedents, the Ninth Circuit in *Blue* v. *Widnall*, 162 F.3d 541 (1998), was able to dispose of a federal employee claim without once citing to Section 7121, the statute that the Federal Circuit spent fourteen pages analyzing in *Mudge*.

This circuit split will not resolve itself without the Court's intervention. The rulings of the courts of appeals are irreconcilable not only in their results but also their reasoning. There is no genuine prospect that any of the circuits will reverse itself, as *all three* have denied rehearing en banc. See Pet. App. 16a; *Mudge*, Order of Feb. 7, 2003; *ASEDAC*, Order of Aug. 19, 2003.

B. The Circuit Conflict Is Untenable Given the Disuniformities It Creates in Federal Personnel Law.

Certiorari is also warranted because the conflict, along both geographic and subject matter lines, is untenable. At year-end 2002, the federal government employed over 2.7 million civilians, of whom 722,931 worked in either the Ninth or the Eleventh Circuits. See OFFICE OF PERSONNEL MGT., *Table of Federal Civilian Employment Ranked by State with Trend Changes*, *available at* http://www.opm.gov/feddata/geograph/2002/index.asp. As the United States itself has acknowledged, the question whether judicial review is available for claims falling within the scope of the negotiated grievance procedures of a federal employee's CBA is one of "exceptional importance." See U.S. Pet. for Reh'g and Reh'g En Banc, *ASEDAC* v. *Panama Canal Comm'n*, at i (CA11 No. 02-13789-GG) (statement of counsel).

As a result of this circuit split, federal personnel law suffers from a lack of uniformity in two separate respects. First, government employees living in different parts of the country, including employees of the same agency, covered by the same Collective Bargaining Agreement, and subject to identical treatment have substantially different rights under federal labor law. Federal employees in the Eleventh Circuit may, like private-sector workers, sue their employer in federal court, while their co-workers in the Ninth Circuit are limited to the grievance procedures provided in their CBAs. Ninth Circuit workers are not merely subjected to a higher standard; they are subject to a categorical bar at the pleading stage,

making the Ninth Circuit rule outcome determinative in every case.

Second, the unique jurisdiction of the Federal Circuit[4] creates a schism between two types of relief. Because the Federal Circuit has appellate jurisdiction over all non-tort money claims against the United States, see 28 U.S.C. 1295(a)(2), (3); *id.* § 1346; *id.* § 1491, all claims relating to back pay will be governed by the Federal Circuit's interpretation of federal law, including the Federal Circuit's interpretation of Section 7121. By contrast, complaints seeking only injunctive relief are governed by the interpretation of federal law adopted by the regional circuit in which they are filed. And "mixed" cases, involving claims both under the Little Tucker Act, over which the Federal Circuit has exclusive appellate jurisdiction, 28 U.S.C. 1295(a)(2), and the Federal Tort Claims Act, *id.* § 1346(b), are reviewable only by the Federal Circuit. See *United States* v. *Hohri*, 482 U.S. 64, 75-76 (1987). Thus, the question whether federal courts have subject matter jurisdiction over cases such as petitioner's will be resolved differently depending on the relief the plaintiff seeks. In petitioner's case, because he is seeking only injunctive relief, the Ninth Circuit's parsimonious interpretation of Section 7121 means that his claim will be barred. No court has held that federal courts have broader jurisdiction over claims for money damages than over equitable claims,[5] yet that is the baffling consequence of the present law. Not only is this situation inequitable to federal employees, but it also complicates efforts by the federal government to establish uniform personnel practices.

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[4] See generally Robert G. Vaughn, *Federal Employment Decisions of the Federal Circuit*, 36 AM. U. L. REV. 825, 859 (1987) ("The [Federal Circuit] plays a very significant role in the development of federal employment law.").

[5] In fact, many courts have held exactly the opposite. See *infra* Part V.

C. Section 7121(a) Does Not Strip Federal Courts of Jurisdiction over Federal Statutory and Constitutional Claims.

Certiorari is also warranted because the decision below is wrong on the merits. As both the Federal Circuit and the Eleventh Circuit recognize, Section 7121(a) does not preclude a federal employee's direct recourse to the federal courts when there is an independent basis for federal jurisdiction, such as an alleged constitutional violation. The Ninth Circuit's contrary ruling cannot be reconciled with either the text of the statute or its legislative history, including particularly that provision's express limitation to "administrative procedure[s]."

"When the statute's language is plain, the sole function of the courts * * * is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citations omitted). Thus, the inquiry must begin with the language of the statute itself. On its face, Section 7121(a) does not preclude a federal employee's direct recourse to the federal courts; to the contrary, it leads to the inescapable conclusion that such recourse *is* available. Subject to three exceptions not relevant here, the statute directs that the negotiated grievance procedures set forth in a federal employee's CBA are "the exclusive administrative procedures for resolving grievances that fall within [the CBA's] coverage." 5 U.S.C. 7121(a)(1) (2000).

Because Congress did not define the term "administrative," this Court will "give [the term] its ordinary meaning." *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995). According to Black's Law Dictionary, "administrative functions or acts are distinguished from such as are judicial." BLACK'S LAW DICTIONARY 45 (6th ed. 1990). Further, this Court has repeatedly recognized the clear and mutually exclusive distinction between the terms "administrative" and "judicial." See, *e.g.*, *Georgia* v.

Ashcroft, 539 U.S. 461, 477 (2003) (noting the distinction between "administrative" and "judicial" preclearance processes in the Voting Rights Act context); *West* v. *Gibson*, 527 U.S. 212, 219 (1999) (explaining that the word "action" often connotes "judicial cases," not "administrative 'proceedings'"); *Hohn* v. *United States*, 524 U.S. 236, 237 (1998) ("[T]his Court may not review a federal judge's actions performed in an administrative, as opposed to a judicial, capacity * * *.") (citations omitted); *Gibson* v. *Berryhill*, 411 U.S. 564, 574 n.13 (1973) (noting the difference between state "judicial" and "administrative" exhaustion requirements).

Given this plain distinction between the terms "administrative" and "judicial," the court of appeals' holding is contrary to this Court's "settled rule that [courts] must, if possible, construe a statute to give every word some operative effect." *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 125 S. Ct. 577, 584 (2004). Construing Section 7121(a)(1) to preclude judicial remedies for federal employees covered by a CBA's negotiated grievance procedures effectively reads the term "administrative" out of the statute, impermissibly rendering that term "administrative" "superfluous, void, or insignificant," *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted)). By contrast, construing Section 7121(a) to preclude other administrative – but not judicial – remedies gives effect to each word in the statute and to Congress's intent to "limit[] the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her CBA" without "restrict[ing] an employee's right to seek a judicial remedy for such grievances." *Mudge*, 308 F.3d at 1228.

Despite the clarity of the statute's terms, the United States argued below that Congress could not have intended to authorize judicial recourse to federal employees "by implication and through technical and conforming amendments." U.S. C.A Br. 43. This argument is without

merit. Before Congress amended Section 7121(a)(1) in 1994, all of the courts of appeals that had addressed the issue – including the Federal Circuit in *Carter* v. *Gibbs*, 909 F.2d 1452 (1990) (en banc), cert. denied, 498 U.S. 811 (1990) – had held that the statute limited the resolution of grievances covered by the CSRA to the negotiated procedures in the federal employees' CBA. 909 F.2d at 1454. The 1994 amendment that added the word "administrative" strongly suggests that Congress did indeed intend to change federal employees' access to the court, for "Congress is presumed to be aware of an administrative or judicial interpretation of a statute," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), and there is a "common-sense presumption that statutes are usually enacted to change existing law," *Wallace* v. *Jaffree*, 472 U.S. 38, 59 n.48 (1985).

Because the statute's language is clear, "only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) (alteration, internal quotations, and citations omitted). In this case, there is no legislative history to contradict the statute's plain meaning. In fact, the legislative history of the 1994 amendment to Section 7121(a)(1) only further undermines the court of appeals' holding.

When Congress amended Section 7121(a)(1) in 1994 to add the term "administrative," neither the House nor the Senate directly addressed the term's significance. Several aspects of the legislative history, however, clearly reflect Congress's understanding that inserting the term "administrative" into Section 7121(a)(1) would provide federal employees with direct access to the courts. First, during the subcommittee hearings on the version of the bill that was eventually passed, two officials from the National Treasury Employees Union urged Congress to overrule the Federal Circuit's decision in *Carter* v. *Gibbs* – which relied on the "unambiguous" language of Section 7121(a), see *Carter*, 909 F.2d at 1454 – and make clear that Section

7121(a) does not preclude federal employees covered by a negotiated CBA from bringing grievances covered by the CBA in federal court. See H.R. 2970, To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv., 103d Cong. 20-23 (1993) (statements of Timothy Hannapel, Assistant Counsel, National Treasury Employees Union, and Robert M. Tobias, President, National Treasury Employees Union). More important, a House committee report to H.R. 2721 – which was also proposed in 1994 but was ultimately unsuccessful – expressly indicated that the term "administrative" had been added to Section 7121(a) to make clear that "the grievance procedure was never intended to deprive employees of access to the courts," thus "correct[ing]" *Carter*. Federal Employees Fairness Act of 1994, H.R. Rep. No. 103-599, pt. 1, at 56 (1994), and that "section 7121 is not intended to limit judicial remedies otherwise provided by law." *Id.* pt. 2, at 75. The temporal proximity of this committee report to the passage of an identical amendment to Section 7121(a) strongly suggests that Congress understood the addition of the term "administrative" to the statute to overrule *Carter* and to allow employees recourse to the federal courts. Cf. *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 460 (1989) (relying, in part, upon House Reports accompanying legislation that pre-dated the Act in question's passage, but which pertained to proposed legislation containing language similar to that in the final Act).[6]

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[6] The court of appeals relied upon 49 U.S.C. 40122(g)(2)(H) for the proposition that petitioner could file a prohibited personnel practice complaint with the Office of Special Counsel. Pet. App. 10a. The court failed to recognize that FAA is not covered by the prohibited personnel practice provisions of Title 5, with the exception of 5 U.S.C. 2302(b), "relating to whistleblowing." See 49 U.S.C. 40122(g)(2)(A). Thus, OSC has taken the position that it

II. This Court Should Also Grant Certiorari Because the Ninth Circuit's Refusal to Provide Equitable Relief Conflicts With the Holdings of Other Circuits and Is Wrong on the Merits.

A. The Circuits Are Also Divided Over Whether the CSRA Precludes Equitable Remedies for Constitutional Violations.

This Court should also grant review to resolve the split among the circuits over whether, when federal employees bring constitutional claims, the CSRA precludes equitable relief by courts or (more narrowly) precludes only *Bivens* actions for money damages.

In this case, the Ninth Circuit also disclaimed subject matter jurisdiction over petitioner's constitutional claims for equitable relief. It applied its longstanding, blanket prohibition of judicial review of any employment-related claim brought by a federal employee. See Pet. App. 8a-9a; see also *Saul* v. *United States*, 928 F.2d 829, 843 (CA9 1991) (holding that "judicial interference in federal employment is disfavored, whether the employee requests damages or equitable relief"). This holding is consistent with that of the Tenth Circuit. See *Lombardi* v. *Small Bus. Admin.*, 889 F.2d 959, 961-62 (1989).[7] Two circuits have held, to the contrary,

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only has jurisdiction over complaints by FAA employees that allege retaliation for whistleblowing. See http://www.osc.gov/ppp.htm#q2.

[7] Two circuits have backed away from earlier cases denying jurisdiction over equitable claims. See *Bryant* v. *Cheney*, 924 F.2d 525, 528 (CA4 1991) (noting split and declining to reaffirm *Pinar* v. *Dole*, 747 F.2d 899, 910 (CA4 1984), "[b]ecause of the weight and difficulty of the issue and our affirmance on other grounds"); *Hardison* v. *Cohen*, 375 F.3d 1262, 1267 (CA11 2004) (noting divergence of authority within circuit and distinguishing *Stephens* v. *Dep't of Health & Hum. Svcs.*, 901 F.2d 1571, 1575-76 (CA11 1990), which denied equitable relief, observing the *Stephens* court's failure to directly address the distinction between legal and

that federal courts retain their authority to enjoin unconstitutional government actions notwithstanding the CSRA's preclusion of constitutional claims for money damages. See *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (CA3 1995); *Hubbard* v. *EPA*, 809 F.2d 1, 11-12 (CADC 1986). This circuit conflict has been repeatedly recognized. See, *e.g.*, *Hubbard*, 809 F.2d at 11 n.15 ("[T]he rule in this Circuit, which has been repeatedly applied, is clearly different [from that of the Fourth Circuit in *Pinar*]."); *Hardison* v. *Cohen*, 375 F.3d 1262, 1267 (CA11 2004) ("Several of our sister circuits have differed on whether equitable relief is precluded by the presence of a statutory remedial scheme."); *Tiltti* v. *Weise*, 155 F.3d 596, 602 (CA2 1998); *Paige* v. *Cisneros*, 91 F.3d 40, 44 (CA7 1996); *Bryant* v. *Cheney*, 924 F.2d 525, 528 (CA4 1991).

1. In *Hubbard*, a suit for reinstatement by an EPA employee, the D.C. Circuit reasoned that federal courts were empowered to grant equitable relief on constitutional claims in work-related suits by federal employees on two grounds. First, "[b]ecause 5 U.S.C. § 702 (1982) waives sovereign immunity from suits not seeking money damages, federal courts have jurisdiction to grant equitable relief to remedy agency violations of constitutional rights." *Hubbard*, 809 F.2d at 11. Second, the *Hubbard* court cited the "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Ibid.* (quoting *Bivens* v.

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equitable remedies). *Hardison* may also suggest a third rule, in between that of the Ninth and Tenth Circuits and that of the Third and D.C. Circuits, which would allow equitable relief if and only if no administrative procedure availed. See *Hardison*, 375 F.3d at 1267 ("Had the *Stephens* plaintiff been left without a remedy, it is not clear that this Court would have found that his equitable claim was barred."). District courts in the Seventh and Eighth Circuits have agreed with the rule of the Ninth and Tenth Circuits. See *Massey* v. *Helman*, 35 F. Supp. 2d 1110, 1116 (C.D. Ill. 1999); *Barhorst* v. *Marsh*, 765 F. Supp. 995, 998 (E.D. Mo. 1991).

Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring)).

The D.C. Circuit rejected the Fourth Circuit's view that the availability of equitable relief for constitutional claims would allow employees to do an "end run" around CSRA procedures, explaining that although *Bivens* actions are a recent creation and "comparatively easy for Congress to preempt," "[t]he court's power to enjoin unconstitutional acts by the government * * * is inherent in the Constitution itself." *Id.* at 11 n.15 (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)). The CSRA does not preempt constitutional claims seeking equitable relief, the court held, because the statute does not "explicitly limit our jurisdiction to enjoin unconstitutional personnel actions by federal agencies." *Ibid.* The court also distinguished this Court's holding in *Bush* v. *Lucas*, 462 U.S. 367, 390 (1983), that judicial awards of money damages are unavailable for claims covered by the CSRA, as "only preclud[ing] damage claims against individuals, not equitable claims against agencies." 809 F.2d at 11.

The D.C. Circuit consolidated *Hubbard* with another case to consider the *Bivens* issue en banc. See *Spagnola* v. *Mathis*, 859 F.2d 223 (CADC 1988) (per curiam). After affirming the panel's ruling that suits for money damages were precluded, the unanimous per curiam opinion explicitly indicated that – contrary to the holdings of some other circuits – the CSRA did not preclude constitutional claims seeking equitable relief. See *id.* at 229-30 ("[T]ime and again this court has affirmed the right of civil servants to seek equitable relief * * * in vindication of their constitutional rights.") (citing, *inter alia*, *Hubbard*).

The Third Circuit has adopted the same rule. In *Mitchum*, that court allowed a suit brought by Veterans Administration employees for injunctive and declaratory relief. The Third Circuit acknowledged the contrary view of other circuits but nonetheless adopted the reasoning of the

D.C. Circuit in *Hubbard* and *Spagnola*. 73 F.3d at 35. Citing the presumption in favor of the availability of equitable relief, the court emphasized that "Congress legislates with the understanding that this form of judicial relief is generally available to protect constitutional rights." *Ibid.* Like the D.C. Circuit, the Third Circuit read *Bush* narrowly, expressing "hesitan[ce] to extend [*Bivens*] jurisprudence into other spheres. Just because 'special factors counseling hesitation' militate against the creation of a new non-statutory damages remedy, it does not necessarily follow that the long-recognized availability of injunctive relief should be restricted as well." *Ibid.*

2. By contrast, as discussed *supra*, the Ninth Circuit rule is that constitutional claims in equity enjoy no special status. The Ninth Circuit's failure to expressly address below the distinction between equitable claims such as petitioner's and claims for money damages was no mere oversight. Rather, the well-established Ninth Circuit rule is that "[f]ederal courts 'have *no power* to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere.'" Pet. App. 7a (quoting *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984) and citing *Blue* v. *Widnall*, 162 F.3d 541, 545 (CA9 1998)). Likewise, the Tenth Circuit in *Lombardi* rejected any distinction between money damages and equitable relief for purposes of determining CSRA preclusion. See *Lombardi*, 889 F.2d at 962 ("[J]udicial intervention is disfavored whether it is accomplished by the creation of a damages remedy or injunctive relief.") (citing *Weatherford* v. *Dole*, 763 F.2d 392 (CA10 1985)). The court believed that the CSRA, along with *Schweiker* v. *Chilicky*, 487 U.S. 412, 421-22 (1988) (expressing reluctance to extend *Bivens* remedies to new areas), "virtually prohibit intrusion by the Courts into the statutory scheme established by Congress." *Lombardi*, 889 F.2d at 961-62.

The Ninth Circuit in *Saul* similarly held – without specifically examining the reasons for distinguishing the two

types of relief – that "judicial interference in federal employment is disfavored, whether the employee requests damages or equitable relief." *Saul*, 928 F.2d at 843. And in the decision below in this case, the Ninth Circuit simply applied its longstanding CSRA preemption doctrine and failed even to mention in its discussion that petitioner seeks only equitable relief. See Pet. App. 7a-8a.

3. Although the circuits have long recognized the split on this issue, they show no inclination to resolve it; rather, their conflicting precedents continue to grow more entrenched. Indeed, some circuits have specifically lamented the lack of clear guidance from this Court. See *Mitchum*, 73 F.3d at 36 (concluding that "[w]ithout more specific guidance from the Supreme Court, we do not think that [precluding equitable relief] is a jump that we should make"); *Hardison*, 375 F.3d at 1266 ("The Supreme Court has not addressed directly the issue * * *."); *Bryant*, 924 F.2d at 528 n.2 ("Resolution of this issue is made more difficult by a distinction the Supreme Court seems to have drawn between *Bivens* actions for damages and equitable claims for injunctive or declaratory relief. The former are precluded by CSRA notwithstanding that they are by definition 'constitutional' claims.") (citing *Bush*).

Such a conflict is untenable. In circuits that interpret the CSRA to preclude constitutional claims for equitable relief, federal employees may in some cases be left without any vehicle for asserting their constitutional rights against federal agencies, except for the administrative process conducted within the agency. See Elizabeth A. Wells, Note, *Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?*, 90 MICH. L. REV. 2612, 2645 (1992) (warning that gaps in CSRA procedures leave "specific classes of federal employees without constitutional protections") (cited in *Hardison*, 375 F.3d at 1267).

In addition, the conflict implicates a central element of separation of powers – the judicial review of executive branch actions. The courts that have permitted equitable claims have noted the traditional reluctance with which courts cede that power and the express command from Congress that is required before they do so. See, *e.g.*, *Hubbard*, 809 F.2d at 11 n.15; *Hardison*, 375 F.3d at 1267 ("Denying federal courts 'the power to review the sufficiency of legislative schemes' and provide equitable relief violates the separation of powers, because the courts are unable to serve 'as a check on other branches of government.'") (quoting Wells, *supra*, at 2642); cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 975-76 (1988).

B. The CSRA Does Not Preclude Courts from Granting Equitable Relief for Constitutional Violations.

Even if the Ninth Circuit's opinion construing Section 7121(a)(1) to preclude federal court jurisdiction over grievances covered by a federal employee's CBA is correct, certiorari is nonetheless warranted because the Ninth Circuit's rule that the CSRA precludes courts from granting federal employees equitable relief for constitutional violations is wrong on the merits. As both the Third and D.C. Circuits recognize, courts should not infer a congressional intent to foreclose injunctive remedies for constitutional violations unless Congress has made that intent unmistakably clear. Further, because the Ninth Circuit's construction of the CSRA would have the effect of stripping *all* courts of jurisdiction to review constitutional violations by federal agencies, it should be rejected so as to avoid serious constitutional questions.

1. This Court held in *Bush* v. *Lucas*, 462 U.S. 367 (1983), that a federal employee's action for money damages for violation of a constitutional right under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403

U.S. 388 (1971), is precluded by the CSRA. *Bush*, 462 U.S. at 389. Both the Ninth and Tenth Circuits have relied upon *Bush* and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), to hold that the CSRA precludes not only constitutional claims for money damages but also claims for equitable relief, a question that neither *Bush* nor *Chilicky* addressed. See *Saul*, 928 F.2d at 843 ("[J]udicial interference in federal employment is disfavored, whether the employee requests damages or injunctive relief."); *Lombardi*, 889 F.2d at 961-62 ("T]he clear purpose of *Chilicky*[, *Bush*, and] related cases is to virtually prohibit intrusion by the Courts into the statutory scheme established by Congress. This judicial intervention is disfavored whether it is accomplished by the creation of a damages remedy or injunctive relief."). These courts, however, fail to recognize the distinction between a damages remedy under *Bivens* and equitable relief.

Applying the rationale of *Bivens* to claims seeking injunctive relief from federal agencies for constitutional violations is misguided. Because "*Bivens* actions are a recent judicial creation and * * * comparatively easy for Congress to preempt," *Hubbard*, 809 F.2d at 11 n.15, this Court has shown "caution toward extending *Bivens* remedies into any new contexts," *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001). On the other hand, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution," *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), a practice that goes back two centuries. See, *e.g.*, *Ex Parte Young*, 209 U.S. 123, 156-57 (1908); *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 10 (1891); *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738, 843, 868 (1824). This long history has established a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring); see also *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 283-84 (1977); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Although Congress may limit the courts'

power to enjoin unconstitutional acts by the government, cf. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), "[i]t is reasonable to assume that Congress legislates with the understanding that this form of judicial relief is generally available to protect constitutional rights," *Mitchum*, 73 F.3d at 35. Even in the case of remedies for violations of statutory rights, this Court has held that "major departure from the long tradition of equity practice should not be lightly implied." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 320 (1982) (citing *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944)). When substantive rights underlying the prayer for equitable relief derive from the Constitution, courts should be even more reluctant to find congressional intent to take the extraordinary step of denying judicial equitable powers unless Congress's intent to do so is unmistakably clear.

Such a clear statement from Congress should be required because depriving the courts of equitable power to remedy constitutional violations would undermine the balance of power between the federal courts and executive agencies. As noted above, courts of equity have historically provided a crucial check against executive encroachment upon constitutional rights. This Court's precedent suggests that Congress must make its intention to shift the balance of power inherent in the constitutional structure unmistakably clear. This Court has demanded a clear statement before ratifying congressional attempts to change the constitutional balance of power in other areas. For example, in the federalism context, this Court held that Congress cannot upset the "constitutionally mandated balance of power," *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)), by abrogating the states' sovereign immunity without "making its intention unmistakably clear in the language of the statute," *ibid.*; see also *id.* at 243 ("[I]t is incumbent upon the federal courts to be certain of Congress's intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The

requirement that Congress unequivocally express this intention in the statutory language ensures such certainty."). Similarly, this Court has held that it "must be absolutely certain that Congress intended" to exercise its Commerce Clause authority to regulate state functions before recognizing such intent. *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991). Further, this Court has announced similar "clear statement" requirements when evaluating congressional attempts to affect the balance of power between the federal legislative and executive branches through broad delegations of authority to administrative agencies. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (noting that the FDA's attempt to regulate tobacco products under the authority granted by the Food, Drug, and Cosmetics Act to regulate "drugs" was an "expansive construction of the statute" that implicated a decision of large "economic and political significance," and therefore holding that "Congress could not have intended to delegate" such a decision "in so cryptic a fashion"). The principle announced by this Court's jurisprudence thus suggests that a congressional attempt to shift the balance of power between the executive and judicial branches by stripping the courts of power to enjoin constitutional violations by federal agencies should not be recognized merely by implication, but rather by statutory language representing unequivocally clear congressional intent.

2. A clear statement from Congress that the CSRA precludes equitable relief for constitutional claims should also be required because such a rule would broadly preclude initial judicial review of constitutional claims by federal employees against their employers. Because this Court held in *Bush* that the CSRA precludes *Bivens* claims for actions covered by the statute, courts' equitable powers represent the only possible avenue for them to review constitutional claims by federal employees that stem from actions covered by the CSRA. Thus, the Ninth Circuit's rule precluding equitable relief for claims covered by the CSRA has the effect of stripping

federal and state courts of the power to review any such constitutional claims.

Although this Court has never squarely addressed the constitutionality of a congressional attempt to strip all courts of jurisdiction to review constitutional claims, see RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 347 (5th ed. 2003), it has on numerous occasions construed statutes to permit judicial review of constitutional claims, thus avoiding "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (in turn quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975)); see also *Johnson* v. *Robison*, 415 U.S. 361, 366-67 (1974). If "Congress intend[ed] to preclude judicial review of constitutional claims" through the CSRA, "its intent to do so must be clear." *Webster*, 486 U.S. at 603. Because Congress did not make clear its intent to preclude all review of constitutional claims through the CSRA, this Court should reject the Ninth Circuit's rule and allow federal courts of equity to remedy constitutional violations by federal agencies against their employees arising from actions covered by the CSRA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Counsel for petitioner were principally assisted by the following members of the Harvard Law School Supreme Court Litigation class: Christopher Houpt and Anton Metlitsky. Class members Mark Conrad, Jeffrey Harris, Elissa Hart, Gregory Reilly, Won Shin, Alixandra Smith, Sharmila Sohoni, and Neel Sukhatme also participated.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35303

TERRY L. WHITMAN,
PLAINTIFF-APPELLANT,

v.

DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA,
U.S. SECRETARY OF TRANSPORTATION,
DEFENDANT-APPELLEES.

Appeal from the United States District Court
for the District of Alaska

Submitted July 7, 2004*
Anchorage, Alaska

Filed August 30, 2004

Before: HALL, KLEINFELD, and WARDLAW, Circuit Judges.

WARDLAW, Circuit Judge:

Terry L. Whitman claims that his employer, the Federal Aviation Administration ("FAA"), an agency within the United States Department of Transportation ("DOT"), violated his rights under 49 U.S.C. § 45104(8) and the First Amendment by disproportionately testing him for substance abuse. Concluding that (i) the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 7101 et seq., governs Whitman's

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* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

employment grievance against the FAA; (ii) the CSRA does not expressly confer federal court jurisdiction over such claims; and (iii) Whitman's sole remedy lies with the negotiated grievance procedures set forth in the collective bargaining agreement ("CBA") between the FAA and the National Association of Government Employees ("NAGE"), the district court dismissed Whitman's action. We affirm[1] because 5 U.S.C. § 7121(a)(1), as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements. *See Golt v. United States*, 186 F.3d 1158, 1164 (9th Cir. 1999).

I

Federal law mandates random substance-abuse tests for FAA employees "whose duties include responsibility for safety-sensitive functions." 49 U.S.C. § 45102(b)(1). Employee selection for such testing must be accomplished by "nondiscriminatory and impartial methods." *Id.* § 45104(8). Whitman is employed by the FAA as an air traffic assistant at the Anchorage Air Route Traffic Control Center. DOT regulations specifically require drug and alcohol testing of FAA air traffic assistants.[2] DOT and FAA regulations provide detailed requirements for the random selection of employees for such testing.[3]

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[1] We review de novo the district court's dismissal for lack of subject matter jurisdiction. *See Orsay v. United States Dep't of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002).

[2] *See* Dep't of Transp., Drug and Alcohol-Free Departmental Workplace, Order No. 3910.1C app. at 5 (Dec. 28, 1994), *available at* http:// www.faa.gov/avr/aam/isap/3910_1c.pdf [hereinafter "DOT Order"].

[3] *See* DOT Order at IV-1 to IV-2; Fed. Aviation Admin., Site Coordinators Handbook: Drug and Alcohol Testing Program §§ II.A-B, IV.A-B, *available at* http://www.faa.gov/avr/aam/isap/cover.pdf.

Because Whitman believed that he had been selected for testing three times more often than similarly situated employees, he filed with the Federal Labor Relations Agency ("FLRA") a charge against the FAA, alleging that its drug and alcohol testing program "does not guarantee individual rights and the randomness of the selection process is suspect." The FLRA responded that Whitman's claim was not within its jurisdiction because he had not alleged that the disproportionate testing was "discrimination against him based on protected union activity." It further explained that the substance-abuse testing program was a condition of Whitman's employment, the terms of which were established by the CBA. The FLRA concluded "that [Whitman's] recourse is through the grievance procedures of the negotiated agreement." It denied Whitman's request for reconsideration. Although Whitman does not dispute CBA coverage, he has never initiated the grievance procedures of that agreement. Instead, Whitman filed an amended complaint in the district court, alleging that his employer's misapplication of the DOT/FAA random substance-abuse testing procedures violated his rights under 49 U.S.C. § 5331(d)(8) (now codified at 49 U.S.C. § 45104(8)), as well as his "First Amendment right to privacy." He requested injunctive relief in the form of an order requiring a survey of other employees to determine how often they were tested and, if the survey were to establish that testing was not random, that the FAA "remedy the situation" by, for example, enjoining any further testing of him until similarly situated employees were tested as often as he.

Quoting *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984), the district court dismissed Whitman's action for lack of subject matter jurisdiction because his claims fall within the scope of the CSRA, under which "federal courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." Whitman's appropriate and sole remedy, as recognized in the CSRA, was to grieve his

allegations pursuant to the CBA procedures, and his failure to do so precluded judicial review. Finally, the district court found the CSRA procedures also preempted Whitman's constitutional claim. *See Russell v. United States Dep't of the Army*, 191 F.3d 1016, 1020 (9th Cir. 1999) ("The CSRA preempts *Bivens* actions and other suits for constitutional violations arising from governmental personnel actions.").

II

A

Although the government argued, and the district court apparently agreed, that Whitman's employment rights are governed by the CSRA, the government now clarifies that it is actually the FAA Personnel Management System ("FAA System") that governs the employment rights of FAA employees.[4] The FAA System incorporates certain relevant provisions of the CSRA through a series of laws enacted by Congress in 1996. *See* 49 U.S.C. § 40122(g)(2). Congress also made other CSRA provisions inapplicable to FAA employees and directed the FAA to develop a unique system of regulations to fill in the gaps, *see id.* § 40122(g)(1), thus establishing a "single unified personnel policy" for FAA employees. *Saul v. United States*, 928 F.2d 829, 833 (9th Cir. 1991) (discussing the CSRA).

Like the CSRA, the FAA System is "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States v. Fausto*, 484 U.S. 439, 445 (1988) (describing the CSRA). While the FAA System generally does not give employees the right to seek review of personnel matters in district court, like the CSRA, it expressly preserves employees' rights under various anti-discrimination laws to sue in district court after exhaustion of administrative remedies. *See* FAA System, Introduction § VIII(b)(ii)

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[4] The FAA System is available at http://www.faa.gov/ahr/policy/PMS/Pmshom2.htm.

(recognizing FAA employees' rights to sue under the Civil Rights Act , the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Rehabilitation Act, among others).

The FAA System incorporates Chapter 71 of title 5, United States Code § 7101 et seq., which governs review of grievances by employees who are subject to a negotiated collective bargaining agreement. *See* 49 U.S.C. § 40122(g)(2)(C). Therefore, despite the direct reference to the CSRA, the district court actually applied the correct law in deciding the government's motion to dismiss for lack of subject matter jurisdiction. *See, e.g.*, *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (analyzing whether federal courts have jurisdiction under the CSRA over an FAA employee's employment-related claims).

B

The CSRA broadly defines "grievance" to include an employee's complaint "concerning any matter relating to the employment of the employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(A); *id.* § 7103(a)(9)(C)(ii). So defined, the term encompasses Whitman's allegations that the FAA tested him for substance abuse disproportionately, in violation of his rights under 49 U.S.C. § 45104(8) and the First Amendment.

The CSRA requires that collective bargaining agreements provide negotiated procedures for the resolution of employee grievances. Section 7121(a)(1) states:

> Any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, [none of which applies in this case] the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

In accordance with this requirement, and as the FLRA informed Whitman, CBA Article 13 provides a

comprehensive administrative process for redress of his grievance concerning his drug and alcohol testing.[5]

The issue before us is whether Whitman may also pursue his employment-related claims in federal court.

III

A

Before the 1994 amendment, CSRA § 7121(a)(1) provided that the required grievance procedures in a collective bargaining agreement "shall be the exclusive procedures for resolving grievances which fall within its coverage." In 1994, without explanation, Congress amended the statute to read that the required grievance procedures "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a) (emphasis added).

Interpreting this amendment, the Federal and Eleventh Circuits recently held that "Congress's addition of the word 'administrative' to § 7121(a)(1) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated procedures contained in his or her CBA." *Mudge*, 308 F.3d at 1227; *see also Asociacion de Empleados del Area Canalera v. Pan. Canal Comm'n*, 329 F.3d 1235, 1241 (11th Cir. 2003) (adopting *Mudge*'s reasoning in full). The Federal Circuit interpreted the statute's text:

> The plain language of § 7121(a)(1) as amended is . . . clear: while § 7121(a)(1) limits the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her CBA, the text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances.
>
> . . . .

[5] The NAGE term agreement relevant to Whitman's case is dated May 26, 1998. It is *available at* http://www.faa.gov/ahr/policy/agree/agrees/ term/nage/nage.cfm.

> . . . The plain language of amended § 7121(a)(1), which provides that the negotiated procedures contained in a CBA are to be the "exclusive administrative procedures for resolving grievances which fall within its coverage," does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress.

Mudge, 308 F.3d at 1228, 1230 (emphasis in original). Thus, the Federal Circuit held that its prior cases, which limited resolution of federal employee grievances exclusively to the negotiated grievance procedures set forth in the employee's collective bargaining agreement, were no longer applicable because those cases were based upon the pre-amendment version of § 7121(a)(1). *Id.* at 1228.

We have no precedent comparable to *Mudge* or *ASEDAC*. In fact, as the district court correctly recognized, our well-established rule is to the contrary: Federal courts "have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." *Veit*, 746 F.2d at 511; *accord Blue v. Widnall*, 162 F.3d 541, 545 (9th Cir. 1998) (quoting *Veit*). Thus, "under the law of this circuit, 5 U.S.C. § 7121(a)(1) preempts employment related claims which fall within collective bargaining agreements" because the statute does not expressly provide for federal court jurisdiction over such claims. *Golt*, 186 F.3d at 1159 (applying post-amendment § 7121(a)(1)).

Although we have never expressly addressed what effect, if any, the 1994 amendment to § 7121(a)(1) had on federal court jurisdiction over federal employee grievances, we implicitly rejected the reasoning of *Mudge* and *ASEDAC* in *Golt*. There, the wife of a deceased former employee of the Army Air Force Exchange Service ("AAFES") brought suit in district court alleging that AAFES had wrongly terminated her husband's employment, in violation of his rights under the Federal Tort Claims Act ("FTCA") and the Constitution. Because neither Golt nor his wife had ever initiated the

grievance process provided in Golt's collective bargaining agreement, the district court dismissed the action for failure to state a claim upon which it could grant relief. Fed. R. Civ. P. 12(b)(6). On appeal, Golt's wife argued that the AAFES should be precluded "from obtaining the benefits of CSRA preemption" because it had failed under the CSRA to give proper notice to its employees that they could request union representation in certain employment proceedings. 186 F.3d at 1164. We rejected the argument. After recognizing that amended § 7121(a)(1) limited an employee of a federal agency "to the grievance procedures in the collective bargaining agreement negotiated with his or her employer in resolving grievances that may result in disciplinary action," 186 F.3d at 1161, we explained:

> Mrs. Golt has not cited any authority to support her contention that we may ignore the express language of a federal statute [i.e., § 7121(a)(1)] that provides the exclusive remedy for a party who seeks relief from an alleged deprivation of his or her rights. While it is true that § 7114(a)(2)(B) of the CSRA requires a federal employer to give its employees annual notice of their right to request union representation at an examination that may result in disciplinary action, the statute does not provide that an employer's failure to do so authorizes an employee to invoke a discrete remedy under the FTCA, or pursuant to federal common law [*i.e.*, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)]. We have no constitutional grant of authority to amend the CSRA to invent such an exception to its application. Only Congress has that power.

186 F.3d at 1164.

Because the addition of the word "administrative" to the statute does not constitute an express grant of federal court jurisdiction, *Golt* correctly held that amended § 7121(a)(1) establishes no more than an exclusive administrative remedy. In contrast, the Federal and Eleventh

Circuits hold that amended § 7121(a)(1) implicitly authorizes federal court jurisdiction because the statute "does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress." *Mudge*, 308 F.3d at 1230; *see also ASEDAC*, 329 F.3d at 1241 ("We hold that Congress' addition of the word 'administrative' to § 7121(a)(1) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated grievance procedures contained in his or her collective bargaining agreement."). The *Mudge*/*ASEDAC* implicit-authorization approach is inconsistent with the law of our circuit, *see Russell*, 191 F.3d at 1019-20; *Blue*, 162 F.3d at 545; *Veit*, 746 F.2d at 511, and with principles the Supreme Court has approved. For example, in *Karahalios v. Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 536-37 (1989), the Court affirmed our decision rejecting a claim that CSRA § 7101 et seq. impliedly authorized federal court jurisdiction over a suit against the union for breach of its duty of fair representation. The Court explained: "Just as in *United States v. Fausto*, we held that the CSRA's 'integrated scheme of administrative and judicial review' foreclosed an implied right to Court of Claims review, we follow a similar course here." *Karahalios*, 489 U.S. at 536 (citations omitted).[6] We

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[6] In addition, our approach is more consistent with the well-established rule that federal courts are courts of limited jurisdiction. As the Supreme Court has recognized: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Indeed, "it remains rudimentary law that 'as regards all courts of the United States inferior to [the Supreme Court], two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. . . . To the extent that such action is

therefore make explicit *Golt*'s assumption that CSRA § 7121(a)(1) does not confer federal court jurisdiction over statutory and constitutional claims concerning employment-related matters within the scope of the negotiated grievance procedures of a federal employee's collective bargaining agreement, and we hold that Congress's 1994 addition of the word "administrative" to the statute does not constitute an express grant of federal court jurisdiction over such claims.

B

Whitman also argues that his complaint of disproportionate drug and alcohol testing should not be viewed as an "employee grievance" but instead as a "prohibited personnel practice" in violation of the FAA's "merit system principles," which require that FAA employees be protected from arbitrary action and provided fair treatment in all aspects of personnel management, with proper regard for their privacy and constitutional rights. *See* FAA System, Introduction § § VII, VIII. Assuming Whitman's allegations state a "prohibited personnel practice," he was required under the CSRA to pursue corrective action through the Office of Special Counsel ("OSC"). *See* 5 U.S.C. §§ 1211-1218 (OSC review); id. § § 2301-2302 (prohibited personnel practices); 49 U.S.C. § 40122(g)(2)(H) (making CSRA provisions concerning OSC investigation of prohibited personnel practices applicable to the FAA). These exclusive administrative remedies preclude judicial review of Whitman's claimed "prohibited personnel practice." *See Orsay*, 289 F.3d at 1128-29. Although Whitman argues that he was unable to pursue such relief because the FAA is immune from OSC investigation, his argument is belied by 49 U.S.C. § 40122(g)(2)(H), which extends the CSRA's provisions for OSC investigation of prohibited personnel practices to the FAA System.

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not taken, the power lies dormant.'" *Finley v. United States*, 490 U.S. 545, 547-48 (1989) (quoting *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868)) (emphasis added in *Finley*).

***

For the foregoing reasons, the district court's dismissal for lack of subject matter jurisdiction is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A02-0112 CV (RRB)

TERRY L. WHITMAN,
PLAINTIFF

v.

DEPARTMENT OF TRANSPORTATION; THE HON. NORMAN Y. MINETA, U.S. SECRETARY OF TRANSPORTATION,
DEFENDANT

Order Granting Defendants' Motion to Dismiss Complaint and Amended Complaint

I. Introduction

Before the Court is Defendant United States Department of Transportation (the "Government") with a Motion to Dismiss the Complaint and the Amended Complaint.[1] The Government asks this Court to dismiss the case for lack of [subject matter] jurisdiction."[2] Plaintiff Terry L. Whitman ("Whitman"), a federal employee for the Federal Aviation Administration ("FAA"), opposed and contends he has no other choice but to bring this action before this Court.[3] Having carefully considered the pleadings and the relevant law, Defendant's Motion to Dismiss the Complaint and the Amended Complaint is hereby GRANTED.

II. Facts

On or about June 4, 2001, Whitman filed a claim with the Federal Labor Relations Authority ("FLRA").[4] In essence, Whitman argued that "the FAA violated his rights

[1] Docket No. 13.

[2] Docket No. 13 at 11.

[3] Docket No. 14 at 7.

[4] Docket No. 14 at 3.

under [a] Union agreement by subjecting him to a disproportionate number of drug and alcohol tests."[5] The FLRA denied the claim and stated the issue(s) raised by Whitman did not involve rights under the Federal Service Labor-Management Relations Statutes, "that are within the jurisdiction of the FLRA."[6] The FLRA further advised, "it appears that your recourse is through the grievance procedures of the negotiated agreement [between the FAA and the National Association of Government Employees ("NAGE")]."[7] Whitman appealed. His appeal was denied "by [the] FLRA in a ruling dated September 24, 2001."[8]

"On October 5, 2001, [and following another drug test, Whitman] filed a Motion for Reconsideration. . . ."[9] It too was denied by the FLRA.

III. Standard of Review

In the absence of subject matter jurisdiction, dismissal is the appropriate disposition.[10]

IV. Discussion

"The preliminary issue in this case is whether a [FAA] employee may challenge government employment actions or practices in the federal courts."[11]

Whitman's rights "are governed by the Civil Service Reform Act ("CSRA").[12] "The CSRA provides a comprehensive scheme for administrative and judicial review of federal personnel actions and practices."[13] As a result, this

[5] Docket No. 13 at 4 (citation omitted).

[6] Docket No. 13, Ex. A at 2.

[7] Docket No. 13.

[8] Docket No. 14 at 3.

[9] Docket No. 14.

[10] *MacKay v. Pfiel*, 827 F.2d 540, 543 (9th Cir. 1987).

[11] *Veit v. Heckler*, 746 F.2d 508, 509 (9th Cir. 1984).

[12] Docket No. 13 at 6 (*citing* 5 U.S.C. § 1101 et seq.) (footnote omitted).

[13] *Veit*, 746 F.2d at 510.

Court has "no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere."[14]

Because the CSRA acknowledges grievance procedures provided through union agreements,[15] and because "Whitman has a remedy through the negotiated agreement between the FAA and the NAGE union,"[16] the Court concludes Whitman should have *grieved* his allegation(s). Because he chose not to do so, this Court cannot provide him with a judicial remedy.[17] Where a remedy is not provided by the CSRA, the Court cannot provide one.[18]

With regard to any and/or all remaining constitutional claims, the Court lacks jurisdiction to review the same.[19]

V. Conclusion

For the reasons stated herein, the Court concludes: "neither the CSRA, the [Administrative Procedure Act] nor any other authority gives it the power to review" Whitman's claim(s) against his employer.[20] As a result, the case is DISMISSED for lack of subject matter jurisdiction.

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[14] *Id.* at 511.

[15] *Saul v. U.S.*, 928 F.2d 829, 834-35 (9th Cir. 1991).

[16] Docket No. 13 at 7.

[17] *Veit*, 746 F.2d at 511 ("Where established procedures provide for hearings and appeals in employment matters, an employee who does not avail himself of those procedures in a timely manner fails to exhaust his administrative remedies and is therefore precluded from seeking judicial review.") (citation omitted).

[18] *Id.*

[19] "[T]he CSRA preempts *Bivens* actions *and* other suits for constitutional violations arising from governmental personnel actions." *Russell v. United States Department of the Army*, 191 F.3d 1016, 1020 (9th Cir. 1999).

[20] *Veit*, 746 F.2d at 511 (9th Cir. 1984).

ENTERED at Anchorage, Alaska, this 25 day of February, 2003.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35303

TERRY L. WHITMAN,
PLAINTIFF-APPELLANT

V.

DEPARTMENT OF TRANSPORTATION; ET AL..
DEFENDANT-APPELLEES.

Filed November 24, 2004

Before: HALL, KLEINFELD, and WARDLAW, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

(6)

No. 04-1131

OFFICE OF THE CLERK

In the Supreme Court of the United States

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

The Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.* (CSRA or Act), provides that "any collective bargaining agreement" between the government and employees' unions "shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Until 1994, Section 7121(a)(1) also provided that, with specified exceptions not implicated here, "the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988). As part of a 1994 technical and conforming amendment, the word "administrative" was added to Section 7121(a)(1), which now provides that "the [collective bargaining agreement grievance] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

The questions presented are as follows:

1. Whether the 1994 technical amendment to 5 U.S.C. 7121(a)(1) implicitly authorized federal employees to sue in federal district court for employment grievances, despite the absence of an explicit judicial remedy for grievances in the CSRA and the comprehensive nature of the remedial system created by the Act.

2. Whether the CSRA precludes a federal employee from seeking equitable relief from a federal district court for an alleged constitutional violation by his or her employer.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 11
Conclusion 28

TABLE OF AUTHORITIES

Cases:

American Fed'n Gov't Employees v. *Loy*, 367 F.3d 932 (D.C. Cir. 2004) 25

Asociacion De Empleados Del Area Canalera v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003) 10, 20

Association of Civilian Technicians, Tony Kempenich Mem'l Chapter 21 v. *FLRA*, 269 F.3d 1119 (D.C. Cir. 2001) 24

Berrios v. *Department of the Army*, 884 F.2d 28 (1st Cir. 1989) 14, 22

Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 12, 22

Bobula v. *DOJ*, 970 F.2d 854 (Fed. Cir. 1992) 17

Broadway v. *Block*, 694 F.2d 979 (5th Cir. 1982) 17

Broughton v. *Courtney*, 861 F.2d 639 (11th Cir. 1988) 14

Bush v. *Lucas*, 462 U.S. 367 (1983) 3, 12, 13, 21

Cases—Continued: Page

Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983) 17
Carter v. *Gibbs*, 909 F.2d 1452 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990), superseded by statute as stated in *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002) 14
Cooper Indus., Inc. v. *Aviall Servs., Inc*, 125 S. Ct. 577 (2004) 12
Director of Rev. v. *CoBank ACB*, 531 U.S. 316 (2001) 18
Hallock v. *Moses*, 731 F.2d 754 (11th Cir. 1984) 22
Hughes v. *Rowe*, 449 U.S. 5 (1980) 26
INS v. *Stevic*, 467 U.S. 407 (1984) 18
Jones v. *TVA*, 948 F.2d 258 (6th Cir. 1991) 14
Karahalios v. *National Fed'n of Fed. Employees*, 489 U.S. 527 (1989) 13, 14, 15
Lehman v. *Morrissey*, 779 F.2d 526 (9th Cir. 1985) 2
Lindahl v. *OPM*, 470 U.S. 768 (1985) 12
Lombardi v. *SBA*, 889 F.2d 959 (10th Cir. 1989) 22
Mitchum v. *Hurt*, 73 F.3d 30 (3d Cir. 1995) 23
Morales v. *Department of the Army*, 947 F.2d 766 (5th Cir. 1991) 14
Mudge v. *United States*:
308 F.3d 1220 (Fed. Cir. 2002) 10, 14, 19, 20
50 Fed. Cl. 500 (2001), rev'd, 308 F.3d 1220 (Fed. Cir. 2002) 18

Cases—Continued: Page

Muniz v. *United States*, 972 F.2d 1304 (Fed. Cir. 1992) 15, 20
National Treasury Employees Union v. *Egger*, 783 F.2d 1114 (D.C. Cir. 1986) 14
O'Connell v. *Hove*, 22 F.3d 463 (2d Cir. 1994) 14
Petrini v. *Howard*, 918 F.2d 1482 (10th Cir. 1990) 14
Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) 14, 16, 23
Premachandra v. *United States*, 739 F.2d 392 (8th Cir. 1984) 14
Rivera v. *United States*, 924 F.2d 948 (9th Cir. 1991) 14
Saul v. *United States*, 928 F.2d 829 (9th Cir. 1991) 22
Schrachta v. *Curtis*, 752 F.2d 1257 (7th Cir. 1985) 14
Shalala v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) 23
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 27
Steadman v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963 (D.C. Cir. 1990) 23
Sturm, Ryder & Co. v. *Chao*, 300 F.3d 867 (D.C. Cir. 2002) 24
Thunder Basin Coal Co. v. *Raich*, 510 U.S. 200 (1994) 23
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 16

Cases—Continued: Page

United States v. *Fausto*, 484 U.S. 439 (1988) 2, 9, 12, 13, 14, 15, 16

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 18

Webster v. *Doe*, 486 U.S. 592 (1988) 22, 27

Constitution, statutes, regulations and rules:

U.S. Const.:

Art. III 22

Amend. I 26, 27

Amend. IV 27

Act of Oct. 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361:

§ 9(b), 108 Stat. 4365 5

§ 9(c), 108 Stat. 4366 6

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 2

5 U.S.C. 2302(a) 4, 25

5 U.S.C. 2302(b)(1) 5

5 U.S.C. 4303 ..... 4, 5, 16, 17, 19

5 U.S.C. 7101 3

5 U.S.C. 7102 3

5 U.S.C. 7103(a)(9)(A) 5

5 U.S.C. 7103(a)(9)(C)(ii) 5

5 U.S.C. 7111 3

5 U.S.C. 7114(a)(1) 3

5 U.S.C. 7117 3

5 U.S.C. 7121 ..... 17, 18

5 U.S.C. 7121(a) 16

5 U.S.C. 7121(a)(1) (1988) 5

Statutes and regulations—Continued: Page

5 U.S.C. 7121(a)(1) ..... *passim*
5 U.S.C. 7121(a)(2) 4, 6
5 U.S.C. 7121(b)(1)(C)(iii) 4, 15, 24
5 U.S.C. 7121(b)(2)(A)(i) 24
5 U.S.C. 7121(c) 4
5 U.S.C. 7121(d) (1988) 5
5 U.S.C. 7121(d) 5, 6, 18, 19
5 U.S.C. 7121(e) 6, 18, 19
5 U.S.C. 7121(e)(1) (1988) 5
5 U.S.C. 7121(e)(1) 6
5 U.S.C. 7121(f) 19
5 U.S.C. 7121(g) 5, 6, 18, 19, 25
5 U.S.C. 7121(g)(2) 6
5 U.S.C. 7121(g)(3) 6
5 U.S.C. 7122 24
5 U.S.C. 7122(a) 4, 15
5 U.S.C. 7122(a)(2) 4
5 U.S.C. 7123(a)(1) 4
5 U.S.C. 7512 ..... 4, 5, 16, 17, 19
5 U.S.C. 7703 ..... 4, 16
Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, Tit. III, § 347, 109 Stat. 460 2
Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, Tit. II, § 253, 110 Stat. 3237 2
Tucker Act, 28 U.S.C. 1491 13

Statutes and regulations—Continued: Page

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, Tit. III, 114 Stat. 115:
§ 307(a), 114 Stat. 124 2
49 U.S.C. 40122(g) 2
49 U.S.C. 40122(g)(1) 3
49 U.S.C. 40122(g)(2) 3
49 U.S.C. 40122(g)(2)(C) 3, 5
49 U.S.C. 40122(g)(2)(H) 10, 24, 25
§ 307(d), 114 Stat. 125 2
§ 308, 114 Stat. 126 2
5 U.S.C. 1211-1218 24
5 U.S.C. 1214 25
5 U.S.C. 1214(a)(1)(A) 25
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49 U.S.C. 5331(d)(8) 7
49 U.S.C. 40122 2
49 U.S.C. 45102(b) 7, 27
49 U.S.C. 45104(8) 7, 8
5 C.F.R.:
Section 771.101 16
Section 771.201 (1994) 16

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Black's Law Dictionary (6th ed. 1990) 19
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Miscellaneous: Page

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OPM, *Agency Administration Grievance System*, 60 Fed. Reg. 47,039 (1995) 16

In the Supreme Court of the United States

No. 04-1131

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 382 F.3d 938. The opinion of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. The court of appeals denied a petition for rehearing on November 24, 2004 (Pet. App. 16a). The petition for a writ of certiorari was filed on February 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Civil Service Reform Act of 1978 (CSRA or Act), Pub. L. No. 95-454, 92 Stat. 1111, to replace a "patchwork system" of federal personnel law "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *Id.* at 443. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985).

Under legislation enacted in 1995 and 1996, and amended in 2000, Congress revised federal personnel law as it applies to employees of the Federal Aviation Administration (FAA). Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, Tit. III, § 347, 109 Stat. 460 (repealed by Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, Tit. III, § 307(d), 114 Stat. 125); Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, Tit. II, § 253, 110 Stat. 3237 (49 U.S.C. 40122); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, §§ 307(a), 308, 114 Stat. 124, 126 (49 U.S.C. 40122(g)). In those enactments, Congress made certain provisions of the CSRA applicable to FAA employees, but

exempted the agency from the remaining provisions. See 49 U.S.C. 40122(g)(2). In lieu of the inapplicable provisions of the CSRA, Congress directed the FAA to create a "personnel management system for the Administration that addresses the unique demands on the agency's workforce." 49 U.S.C. 40122(g)(1). To discharge that responsibility, the agency created the FAA Personnel Management System. See Federal Aviation Administration, U.S. Dep't of Transp., *FAA Personnel Management System* (Mar. 28, 1996), <http://www.faa.gov/ahr/policy/PMS/PMshom2.htm> (*FAA Pers. Mgmt. Sys.*).

The applicable provisions of the CSRA and the FAA Personnel Management System together comprise a personnel system that is as fully comprehensive as that created by the CSRA. Like the CSRA, the hybrid FAA personnel system is an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983).

2. Chapter 71 of the CSRA, which governs the work-related grievances of federal employees, continues to apply to FAA personnel. 49 U.S.C. 40122(g)(2)(C). Under Chapter 71, federal employees may join unions to engage in collective bargaining, 5 U.S.C. 7101, 7102; management is obligated to engage in collective bargaining, 5 U.S.C. 7111, 7114(a)(1), 7117; and every collective bargaining agreement is required to contain a procedure for "the settlement of grievances," 5 U.S.C. 7121(a)(1). However, a "collective bargaining agreement may exclude any matter from the

application of the grievance procedures."[1] 5 U.S.C. 7121(a)(2).

Any grievance that is subject to but not settled under the negotiated grievance procedures "shall be subject to binding arbitration which may be invoked by either the [union] or the agency." 5 U.S.C. 7121(b)(1)(C)(iii). Either party may then challenge the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA), 5 U.S.C. 7122(a), which may "take such action and make such recommendations concerning the [arbitral] award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. 7122(a)(2). The FLRA's decision regarding a challenge to an arbitration award is not subject to judicial review, unless the matter decided by the arbitrator involves an unfair labor practice. 5 U.S.C. 7123(a)(1). However, if the subject of the grievance is an adverse employment action covered by 5 U.S.C. 4303 or 7512 (discussed at p. 16, *infra*), the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 to the same extent as if the matter had been decided by the Merit Systems Protection Board.

The CSRA and the FAA Personnel Management System identify certain personnel actions as "prohibited personnel practice[s]." 5 U.S.C. 2302(a); *FAA Pers. Mgmt. Sys.* intro. § VIII. Both also identify certain adverse employment actions (actions taken because of unacceptable performance, suspensions or reductions in grade, etc.). 5 U.S.C. 4303, 7512; *FAA Pers. Mgmt. Sys.* ch. III § 3. The

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[1] In addition, the statute excludes from the grievance process specific categories of disputes, including prohibited political activities, retirement, life or health insurance, a suspension or removal for national security purposes, classification of positions that do not result in a reduction of grade, and examination, certification, or appointment. 5 U.S.C. 7121(c). Those exceptions are not relevant here.

CSRA's broad definition of "grievance" (incorporated into the FAA Personnel Management System by 49 U.S.C. 40122(g)(2)(C)) encompasses both prohibited personnel practices and adverse employment actions. See 5 U.S.C. 7103(a)(9)(A) and (a)(9)(C)(ii). Thus, an FAA employee covered by a collective bargaining agreement (CBA) can contest prohibited personnel practices and adverse actions through the grievance procedures established by the CBA.

The CSRA provides administrative remedies, in addition to the negotiated grievance procedure, for prohibited personnel practices involving discrimination on the basis of race, sex, religion, age, disability, and other protected grounds, and for certain adverse employment actions. See 5 U.S.C. 2302(b)(1), 4303, 7512. Before 1994, if a grievance was covered by both the negotiated grievance procedure and by other procedures, an employee was required to elect which of those procedures he wished to pursue. 5 U.S.C. 7121(d) and (e)(1) (1988). But if the grievance did not involve one of those specified prohibited personnel practices or adverse employment actions for which alternative remedies were preserved, and if the matter was not excluded from the grievance procedures under the CBA, Section 7121(a)(1) provided that the negotiated grievance "procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988).

In 1994, Congress added a new subsection (g) to Section 7121, which expanded employees' available options by giving employees covered by a CBA a choice of alternative remedies for prohibited personnel practices not previously covered by subsection (d). Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. Under the 1994 amendment adding Section 7121(g), employees may challenge a personnel action under the negotiated grievance procedure, or

they may elect to pursue available administrative remedies through appeal to the Merit Systems Protection Board (MSPB), or by seeking corrective action from the Office of Special Counsel in the case of a prohibited personnel practice. 5 U.S.C. 7121(g). Thus, under current law, where a grievance is covered both by a collective bargaining agreement's negotiated grievance procedures and by other procedures under Section 7121(d), (e) or (g), an employee has a choice of administrative remedies. 5 U.S.C. 7121(d), (e)(1), (g)(2) and (3).

To accommodate the addition of Section 7121(g), Congress also made what it characterized as "Technical and Conforming Amendments" to Section 7121(a)(1), the provision that requires CBAs to have grievance procedures and in general renders those procedures exclusive. Act of Oct. 29, 1994, § 9(c), 108 Stat. 4366. The amendment made two revisions to the second sentence of Section 7121(a)(1): it added subsection (g) to its list of statutory exceptions to the provision making grievance procedures exclusive, and it added the word "administrative" between "exclusive" and "procedures." As amended, Section 7121(a)(1) provides:

> Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

5 U.S.C. 7121(a)(1). Section 7121(a)(2) provides that "[a]ny collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement."

3. Petitioner works for the FAA in Alaska as an Air Traffic Assistant. Pet. 2. As an FAA employee "whose duties include responsibility for safety-sensitive functions," petitioner is subject to random testing for illegal use of controlled substances. 49 U.S.C. 45102(b).

In June 2001, acting pro se, petitioner filed an unfair labor practice charge with the FLRA, alleging that the FAA had subjected him to a disproportionate number of drug and alcohol tests, Pet. App. 13a, and claiming that the FAA's drug and alcohol testing program "does not guarantee individual rights and the randomness of the selection process is suspect," *id.* at 3a. The FLRA denied petitioner's unfair labor practice charge, explaining that it did not fall within the FLRA's jurisdiction because the claim did not allege discrimination based on protected union activity. *Ibid.* The FLRA explained that, instead, petitioner's "recourse is through the grievance procedures of the negotiated agreement" between petitioner's union and the FAA. *Ibid.* (internal quotation marks omitted).

4. Petitioner did not initiate the grievance procedures of the collective bargaining agreement. Pet. App. 3a. Instead, petitioner, again acting pro se, filed suit in federal district court against the Department of Transportation, the parent agency of the FAA. *Ibid.* Petitioner's complaint alleged that the Department of Transportation had required him to take a disproportionate number of drug tests and the agency had thereby "violated Title 49 U.S.C. 5331(d)(8) [and 49 U.S.C. 45104(8)], which state[] that the Secretary of Transportation shall develop requirements that shall 'ensure that employees are selected by nondiscriminatory and impartial methods.'" C.A. Supp. E.R. 7-8.[2]

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[2] Section 5331(d)(8) of Title 49 provides that, in carrying out alcohol and drug testing programs, the Secretary of Transportation shall

Petitioner alleged that "[b]y [his] own informal methods," *id.* at 9, he had determined that he had been subjected to a higher number of drug and alcohol tests than other employees. *Ibid.* Petitioner sought injunctive relief, requesting the district court to require the FAA to conduct "a survey of similarly-situated employees to establish an average number of selections for substance-testing," *id.* at 11, and an order requiring the FAA to "remedy the situation" if the survey established that petitioner had not been tested randomly, by, for example, "enjoining the [FAA] from subjecting [petitioner] to any further substance-testing" until similarly situated employees had been tested as often as he. *Ibid.*

Petitioner later sought to amend his complaint. In his pro se motion to amend his complaint, petitioner alleged that on September 25, 2002, while he was at work, he had been required to submit to a substance-abuse test to "make up" a test that had been scheduled for August 28, 2002, which petitioner had missed. C.A. Supp. E.R. 25. Petitioner alleged that no provision of Title 49 of the United States Code authorized the FAA "to conduct a makeup test," *id.* at 28-29. Petitioner also alleged that "[t]he incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample." *Id.* at 31.

The district court dismissed petitioner's action for lack of subject matter jurisdiction. The court held that "federal

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prescribe regulations to "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from employees in similar circumstances." A similar requirement is set forth in 49 U.S.C. 45104(8).

courts have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." Pet. App. 3a (internal quotation marks omitted). The court concluded that petitioner's sole remedy was to submit his allegations pursuant to the CBA's procedures (which also provided for binding arbitration), and that his failure to do so precluded judicial review.

5. The court of appeals affirmed. Pet. App. 1a-11a. The court noted that the FAA Personnel Management System, like the CSRA, "is 'an integrated scheme of administrative and judicial review,'" Pet. App. 4a (quoting *Fausto*, 484 U.S. at 445). The court explained that, although the FAA system generally does not give employees the right to seek review of personnel matters in district court in the first instance, it, like the CSRA, expressly preserves employees' rights under various anti-discrimination laws to sue in district court after exhaustion of administrative remedies. *Id.* at 4a-5a. The court further observed that the FAA Personnel Management System incorporates the CSRA provisions governing employee grievances, that Section 7121(a)(1) requires collective bargaining agreements to contain procedures for settling grievances, and that the collective bargaining agreement covering petitioner "provides a comprehensive administrative process for redress of his grievance concerning his drug and alcohol testing." *Id.* at 5a-6a.

The court of appeals then held that the FAA Personnel Management System provided that the grievance procedures created by the collective bargaining agreement were petitioner's sole remedy and precluded direct action in federal court. The court explained that the "well-established rule" is that, in light of the comprehensive remedial scheme provided in the CSRA, courts begin with the presumption that courts "have no power to review federal personnel de-

cisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." Pet. App. 7a (internal quotation marks and citation omitted). Because Section 7121(a)(1) "does not expressly provide for federal court jurisdiction" over employment-related claims that fall within collective bargaining agreements, *ibid.*, the court of appeals concluded that federal courts lack authority to entertain such claims. The court acknowledged that the Federal Circuit and the Eleventh Circuit had concluded that the 1994 amendments to Section 7121(a)(1) authorized courts to review federal employee grievances. *Id.* at 6a-7a (citing *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003); *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002)). The court rejected that position, stating that those courts had concluded that the addition of the word "administrative" in 1994 *implicitly* authorized federal court jurisdiction over such claims, but in light of the comprehensiveness of the CSRA remedial scheme, that was an insufficient basis to support federal judicial review of employee grievances. *Id.* at 9a-10a.

Finally, the court of appeals rejected petitioner's contention that his grievance should be construed as a prohibited personnel practice and that the federal courts can review such claims. Assuming that his grievance could be construed in that way, the court of appeals held that petitioner was required under the CSRA to seek corrective action from the Office of Special Counsel, and that that exclusive administrative remedy "preclude[s] judicial review of [petitioner's] claimed 'prohibited personnel practice.'" Pet. App. 10a; see 49 U.S.C. 40122(g)(2)(H) (making CSRA provisions concerning Office of Special Counsel investigations of prohibited personnel practices applicable to the FAA).

DISCUSSION

Petitioner contends that this Court's review is warranted with respect to two issues. First, petitioner contends (Pet. 6-15) that review is warranted to resolve a conflict in the circuits about whether the 1994 amendment to Section 7121(a)(1) provides for judicial review of federal employees' grievances. Second, petitioner argues (Pet. 16-25) that the circuits are divided about whether the CSRA precludes courts from granting equitable relief for constitutional violations.

The court of appeals correctly held that the CSRA does not provide federal employees subject to the FAA Personnel Management System direct judicial review of work-related grievances. Nevertheless, we concur with petitioner that certiorari is warranted on the question whether the 1994 amendment to 5 U.S.C. 7121(a)(1) implicitly authorized judicial review of federal employee grievances. The Court should limit its review to that statutory question, however, because petitioner did not invoke the available grievance procedures before seeking to raise his constitutional claim, and because that constitutional claim is plainly insubstantial.

1. Petitioner contends (Pet. 12-15) that Section 7121(a)(1), as amended in 1994, should be construed to permit federal court review of employee grievances because the provision "does not preclude a federal employee's direct recourse to the federal courts." Pet. 12. According to petitioner, because a distinction is sometimes drawn "between the terms 'administrative' and 'judicial,'" Pet. 13, the 1994 amendment specifying that the grievance procedures provided by a CBA are the "exclusive *administrative* procedures" for certain employee grievances implies that *judicial* procedures are available to review employee griev-

ances. To hold otherwise, petitioner contends, would render the term "administrative" superfluous, contrary to the general rule "that [courts] must, if possible, construe a statute to give every word some operative effect." *Ibid.* (quoting *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 125 S. Ct. 577, 584 (2004)). That argument lacks merit. The court of appeals correctly concluded that the 1994 technical and conforming amendment to Section 7121(a)(1) did not authorize judicial review of employee grievances that previously had been foreclosed.

The CSRA "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), "prescrib[ing] in great detail the protections and remedies" available to federal employees, "including the availability of administrative and judicial review," *United States* v. *Fausto*, 484 U.S. 439, 443 (1988). On a number of occasions, this Court has considered whether federal employees may seek judicial review of work-related disputes where such review is not specifically provided by the CSRA. In each case, the Court has held that federal employees are limited to the remedies explicitly provided by statute. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to recognize an implied cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to enable a federal employee to sue an agency official for damages for alleged constitutional violations in employment. Despite the recognition in other contexts of a damages cause of action against federal officials for constitutional violations, the Court held that it would be "inappropriate" to supplement the "comprehensive procedural and substantive provisions" regulating federal em-

ployment with a new judicial remedy. *Bush*, 462 U.S. at 368.[3]

Similarly, in *Fausto*, the Court held that the CSRA's "integrated scheme of administrative and judicial review" precluded federal employees from obtaining judicial review in a suit for back pay under the Tucker Act, 28 U.S.C. 1491, where the CSRA did not explicitly provide for that remedy. 484 U.S. at 445. Considering both the language and the structure of the CSRA, the Court held "that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather a manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449. And in *Karahalios* v. *National Federation of Federal Employees*, 489 U.S. 527 (1989), the Court held that judicial enforcement of the duty of fair representation is barred, because the CSRA empowers the Federal Labor Relations Authority to enforce a union's statutory duty of fair representation and because "[t]here is no express suggestion in [the CSRA] that Congress intended to furnish a parallel remedy in a federal district court to enforce" the duty. *Id.* at 532.

As the court of appeals correctly concluded, Pet. App. 9a-10a, Congress's 1994 technical amendment to Section 7121(a)(1) did not *sub silentio* reverse longstanding law and create a new right to judicial review of federal employee grievances. Petitioner does not contend that the addition of the word "administrative" constitutes an express grant

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[3] Although *Bush* was decided after the enactment of the CSRA, it concerned the federal personnel system the CSRA replaced. This Court has cited *Bush* for the principle that a comprehensive personnel system precludes judicial remedies not provided for by the system. See *Karahalios* v. *National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989).

of a right of judicial review; rather he argues that the "add[ition] [of] the word 'administrative *strongly suggests*" that Congress intended to create a right of judicial review. Pet. 14 (emphasis added). But a "suggest[ion]" falls far short of what is required to create a right of judicial review to supplant the remedial system of the CSRA. This Court held twice prior to 1994 that "the CSRA's 'integrated scheme of administrative and judicial review' foreclose[s] an implied right to [district court] review." *Karahalios*, 489 U.S. at 536 (quoting *Fausto*, 484 U.S. at 445). By 1994, it was also firmly established in the court of appeals that, in addressing employment-related claims of federal employees, courts would not infer a right to judicial review where none was *explicitly* provided by the comprehensive scheme of the CSRA. As petitioner concedes (Pet. 14), based on that principle, the courts of appeals uniformly had held before the 1994 amendment that the CSRA precludes judicial review of various statutory and non-statutory claims unless the Act expressly provided for such review.[4] There is thus

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[4] See, *e.g.*, *Berrios* v. *Department of the Army*, 884 F.2d 28, 31-32 (1st Cir. 1989) (state law tort claim); *O'Connell* v. *Hove*, 22 F.3d 463, 470-471 (2d Cir. 1994) (Fair Labor Standards Act (FLSA) overtime claim); *Pinar* v. *Dole*, 747 F.2d 899, 910-911 (4th Cir. 1984) (prohibited personnel practice), cert. denied, 471 U.S. 1016 (1985); *Morales* v. *Department of the Army*, 947 F.2d 766, 768-769 (5th Cir. 1991) (Federal Tort Claims Act (FTCA) claim); *Jones* v. *TVA*, 948 F.2d 258, 265 (6th Cir. 1991) (claim under 42 U.S.C. 1985(1)); *Schrachta* v. *Curtis*, 752 F.2d 1257, 1259-1260 (7th Cir. 1985) (adverse personnel action); *Premachandra* v. *United States*, 739 F.2d 392, 393-394 (8th Cir. 1984) (FTCA claim); *Rivera* v. *United States*, 924 F.2d 948, 951-952 (9th Cir. 1991) (FTCA claim); *Petrini* v. *Howard*, 918 F.2d 1482, 1484-1485 (10th Cir. 1990) (state law tort claim); *Broughton* v. *Courtney*, 861 F.2d 639, 644 (11th Cir. 1988) (state law tort claim); *National Treasury Employees Union* v. *Egger*, 783 F.2d 1114, 1117 (D.C. Cir. 1986) (prohibited personnel practice); *Carter* v. *Gibbs*, 909 F.2d 1452 (Fed. Cir.) (FLSA overtime claim), cert. denied, 498 U.S. 811 (1990), superseded

no reason to believe that Congress would have thought in 1994 that the mere insertion of the word "administrative" in 5 U.S.C. 7121(a)(1) would suffice to create a new independent right to judicial review of matters subject to grievance procedures under a CBA.

Petitioner's reading of Section 7121(a)(1) is also contrary to the statutory scheme embodied in the CSRA. As discussed above, where an employee's position is covered by a CBA, the CSRA channels employee grievances through negotiated grievance procedures unless the subject matter of the grievance falls in an express statutory exception or has been specifically excluded from coverage by the CBA itself. If those procedures do not resolve the grievance, either the union or the agency may invoke binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), with subsequent review of the arbitrator's decision by the FLRA, 5 U.S.C. 7122(a). That structure reflects "the Congressionally unambiguous and unmistakable preference for exclusivity of arbitration[, which] is a central part of the comprehensive overhaul of the civil service system provided by the CSRA." *Muniz* v. *United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). "To hold that the district courts must entertain such cases in the first instance would seriously undermine what [the Court] deem[s] to be the congressional scheme." *Karahalios*, 489 U.S. at 536-537; accord *Fausto*, 484 U.S. at 449 (holding that judicial review outside the framework of the CSRA was incompatible with various "structural elements" of the CSRA, such as "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review").

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by statute as stated in *Mudge* v. *United States*, 308 F.3d 1220, 1227, 1230 (Fed. Cir. 2002) (holding that *Carter* was overruled by 1994 amendment).

That conclusion is reinforced by the fact that Congress expressly provided for a right of judicial review on the part of the employee in one specific situation in which a dispute has been submitted to grievance procedures under a CBA: if the matter involves an adverse employment action covered by 5 U.S.C. 4303 or 7512, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 in the same manner and under the same conditions as if it had been rendered by the Merit Systems Protection Board. Congress's provision of an express right of judicial review for such matters underscores that review of grievances is precluded in other circumstances. See *Fausto*, 484 U.S. at 447-450; *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

Indeed, petitioner's construction of the amended Section 7121(a) produces an anomalous result that Congress should not lightly be deemed to have intended. Federal agencies have established their own grievance procedures for employees who are not covered by CBAs and therefore are not subject to the grievance procedures contained in such agreements. See 5 C.F.R. 771.201 (1994) (requiring establishment of grievance procedures).[5] The courts of appeals uniformly have held that the CSRA precludes employees subject to an agency's grievance procedures from bypassing those procedures and seeking judicial consideration of their grievances. See, *e.g.*, *Pinar* v. *Dole*, 774 F.2d 899, 905-907 (4th Cir. 1984), cert. denied, 471 U.S. 1016

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[5] The Office of Personnel Management rescinded the regulations governing agency administrative grievance procedures to permit agencies greater flexibility in the establishment of grievance systems. OPM, *Agency Administrative Grievance System*, 60 Fed. Reg. 47,039 (1995). But each agency was required to maintain its previously established grievance systems until the system was either modified or replaced. 5 C.F.R. 771.101.

(1985); *Carducci* v. *Regan*, 714 F.2d 171, 172-175 (D.C. Cir. 1983); *Broadway* v. *Block*, 694 F.2d 979, 982-983 (5th Cir. 1982); see also *Bobula* v. *DOJ*, 970 F.2d 854, 856, 858 (Fed. Cir. 1992) (refusing to enforce settlement agreement that resolved grievances asserted through agency's grievance procedures because CSRA does not authorize judicial enforcement of such settlement agreements). Under petitioner's interpretation of Section 7121 and the 1994 amendments, however, federal employees subject to a CBA may now avoid the grievance procedures established by the CBA and present their grievances directly to the courts without resort to any administrative procedures at all. But because Section 7121 applies only to grievance procedures established by CBAs, federal employees who are not subject to CBAs would remain limited to pursuing their agencies' internal grievance procedures and would be precluded from obtaining judicial review. That preferential treatment of employees subject to CBAs makes little sense. Grievance procedures established by CBAs are the product of an agreement between a federal agency and a union, the federal employee's bargaining representative. There is no reason to believe that Congress intended to grant federal employees a right to bypass grievance procedures that are the product of collective bargaining and go directly to court—even for minor disputes—while at the same time continuing to subject other federal employees to grievance procedures over which they had no say and continuing to foreclose judicial review for such employees except in cases of significant adverse employment actions covered by 5 U.S.C. 4303 or 7512 or cases involving alleged discrimination.

Petitioner's construction also is contrary to this Court's admonition that courts should be cautious about interpreting technical and conforming amendments to make sub-

stantive changes to the law where "there is no indication that Congress intended to change" the law. *Director of Rev.* v. *CoBank ACB*, 531 U.S. 316, 323 (2001). Conforming amendments are typically added for the sake of clarity and are not intended to change legal standards.[6] See, *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 428 (1984). Petitioner's reading "would mean that Congress made a radical—but entirely implicit—change" in the 1994 amendment. *CoBank*, 531 U.S. at 324. "[I]t would be surprising, indeed, if Congress" had done that "*sub silentio*." *Id.* at 323; see *Mudge* v. *United States*, 50 Fed. Cl. 500, 506 (2001) ("We find it inconceivable that Congress intended to alter this basic structural reform of the Civil Service Reform Act by a one-word change that was introduced as a technical amendment without discussion, explanation, or debate."), rev'd, 308 F.3d 1220 (Fed. Cir. 2002).

Petitioner errs in contending that reading the 1994 amendment *not* to create a judicial remedy would deprive the amended language of meaning. The conforming amendment that added "administrative" to Section 7121(a)(1) served to clarify the remedies available to federal employees for grievances. As explained above, the 1994 amendments added a new subsection (g) to Section 7121, which gave federal employees a choice of administrative remedies for grievances concerning prohibited personnel practices other than discriminatory personnel actions. Similarly, under subsections (d) and (e), federal employees have a choice of administrative remedies for addressing grievances relating to discriminatory personnel practices and adverse actions. The conforming amendment clarified and con-

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[6] Thus, the "presumption that statutes are usually enacted to change existing law," on which petitioner relies (Pet. 14) (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 59 n.48 (1985), is not generally applicable to technical and conforming amendments.

firmed that, except for those three circumstances, the negotiated grievance procedures "shall be the exclusive administrative procedures" for federal employee grievances, 5 U.S.C. 7121(a)(1), and at the same time preserved judicial review of administrative decisions rendered under the other provisions that remain available to employees under subsections (d), (e) and (g). The reference to "exclusive administrative procedures" in Section 7121(a)(1) also confirms that under subsection (f), which provides that even where an employee *has* elected to pursue administrative grievance procedures, the employee retains a right of *judicial* review if the subject matter of the grievance is an adverse employment action covered by 5 U.S.C. 4303 or 7512.

2. As petitioner observes (Pet. 6-10), the courts of appeals have reached conflicting conclusions about whether the 1994 amendment to 49 U.S.C. 7121(a)(1) authorizes judicial review of federal employee grievances. The Federal Circuit held that the amendment implicitly reversed established law and authorizes judicial review of federal employee grievances. *Mudge* v. *United States*, 308 F.3d 1220, 1228-1230 (2002). The court concluded that because amended Section 7121(a)(1) "no longer restricts a federal employee's right to pursue an employment grievance in court," judicial review is now available. *Id.* at 1232. The court reasoned that because "administrative" is sometimes used to "distinguish from such [functions and acts] as are judicial," *id.* at 1228 (quoting *Black's Law Dictionary* 45 (6th ed. 1990), the provision stating that Section 7121(a)(1) limited only "the administrative resolution of a federal employee's grievances" implicitly placed no limitation on "an employee's right to seek a judicial remedy for such grievance." *Id.* at 1228. Although the Federal Circuit acknowledged Congress's "unambiguous and unmistakable preference f[or] exclusivity of arbitration," *id.* at 1231 (quoting

Muniz, 972 F.2d at 1309), it held that the "plain language" of amended Section 7121(a)(1) overrode "these policy concerns." *Mudge*, 308 F.3d at 1231-1232. In *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (2003), the Eleventh Circuit explicitly "adopt[ed] th[e] reasoning" of *Mudge* "on all * * * points," *id.* at 1241, "hold[ing] that Congress's addition of the word 'administrative' to § 7121(a)(1) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated grievance procedures contained in [the] collective bargaining agreement." *Ibid.*

The Ninth Circuit correctly rejected that construction. Pet. App. 8a-9a. It concluded that "[t]he *Mudge/ASEDAC* implicit-authorization approach is inconsistent * * * with principles the Supreme Court has approved"—specifically, that in light of the integrated and comprehensive nature of CSRA, courts should not infer judicial remedies. *Id.* at 9a (citations omitted). The Ninth Circuit held that, consistent with the principles established in *Karahalios* and *Fausto*, courts should recognize a right of judicial review under a comprehensive scheme such as that created by the FAA Personnel Management System or the CSRA only where it is "express[ly] grant[ed]." *Id.* at 10a. There is thus a clear multi-circuit conflict on the proper analysis of the 1994 amendment to Section 7121(a)(1). Because all three courts have denied rehearing en banc on this issue, see Pet. App. 16a; 2/7/03 Order at 1, *Mudge* v. *United States*, *supra* (No. 02-5024); 8/19/03 Order at 1, *ASEDAC* v. *Panama Canal Comm'n*, *supra* (No. 02-13789), the conflict likely will persist absent this Court's intervention.

Moreover, this case implicates a recurring issue of considerable practical importance both to the Nation's largest employer and its employees. The rule adopted by the Fed-

eral Circuit and Eleventh Circuit could require the federal government to litigate employee grievances in federal court in the first instance, involving considerable delay and additional expense compared to the traditional—and congressionally preferred—remedy of addressing such claims through the negotiated grievance process, followed by the availability of binding arbitration. Because employment grievances of the sort governed by Section 7121(a)(1) are exceptionally common, the rule adopted by the Federal and Eleventh Circuits would create a significant litigation burden on the federal government. That approach also undermines the government's ability to seek to resolve complaints informally through the grievance process, undermines the role of the collective bargaining representative in resolving grievances, and undermines the advantages of arbitration in bringing about an expeditious and consistent resolution of disputes for the benefit of all employees in the workplace. The circuit conflict also creates an untenable lack of uniformity in federal employment law. Accordingly, this Court's review is warranted.

3. Petitioner contends (Pet. 21-25) that the CSRA should be construed to permit judicial review of a federal employee's grievances when the employee seeks equitable relief for an alleged constitutional violation. Petitioner contends (Pet. 21) that, because the CSRA precludes federal employees' suits for money damages for violation of a constitutional right, see *Bush* v. *Lucas*, 462 U.S. at 368, construing the statute to preclude judicial review of a constitutional claim for equitable relief would have "the effect of stripping *all* courts of jurisdiction to review" employment-related constitutional claims of federal employees. In petitioner's view, the CSRA should be construed to avoid the "serious constitutional question" that would be presented if "a federal statute were construed to deny any judicial

forum for a colorable constitutional claim." Pet. 25 (quoting *Webster* v. *Doe*, 486 U.S. 592, 603 (1988)).[7] Petitioner also maintains (Pet. 16-21) that the courts of appeals are divided about whether the CSRA affords equitable remedies for constitutional violations. Review of this contention is not warranted at this time.

Petitioner is correct that the courts of appeals have reached different conclusions on the narrow question of the availability of equitable relief under the CSRA for employment-related injuries, including constitutional claims. The majority of the circuits that have addressed the question have held that the comprehensive nature of the CSRA precludes equitable remedies for employment-related injuries, just as it excludes other forms of judicial relief not expressly provided by the statute. See *Saul* v. *United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Lombardi* v. *SBA*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Berrios* v. *Department of the Army*, 884 F.2d 28, 31 (1st Cir. 1989); *Hallock* v. *Mo-*

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[7] A related issue has been raised by another petition now pending before the Court. The petition filed in *Dotson* v. *Griesa*, No. 04-1276 (Mar. 22, 2005), presents two issues. The first is whether a Judicial Branch employee who is an "excepted employee" under the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 111, is precluded from seeking equitable relief in a lawsuit challenging the termination of his employment on constitutional grounds. The petition also presents the question whether a cause of action for damages should be inferred under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against federal District Court judges and other judicial personnel in the employment context. The government's brief in opposition in that case takes the position that the petition for a writ of certiorari should be denied on both issues. To the extent that the Court is inclined to consider the availability of injunctive relief for constitutional claims otherwise subject to the CSRA's comprehensive remedial system, this case provides the better vehicle because it does not involve the special considerations implicated by the Article III setting of *Dotson*.

ses, 731 F.2d 754, 757 (11th Cir. 1984); see also *Pinar*, 747 F.2d at 909-912 (holding that CSRA precludes equitable relief, at least where constitutional injury is not major). The Third Circuit, by contrast, has held that the CSRA does not prevent a federal employee from seeking equitable relief for a constitutional employment claim. *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (1995). The District of Columbia Circuit has held that equitable relief is available for federal employees asserting constitutional claims, but it generally requires exhaustion of administrative remedies as a prerequisite to bringing suit. See *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (1990) ("Only in the unusual case in which the constitutional claim raises issues totally unrelated to the CSRA procedures can a party come directly to district court.").

Nevertheless, review of this contention is not warranted. Petitioner failed to make use of the comprehensive scheme of administrative relief afforded to him by the FAA and CSRA. The rule is well established that where "a constitutional claim is intertwined with a statutory one," and "machinery" exists "for the resolution of the latter, a plaintiff must first pursue the administrative machinery." *Steadman*, 918 F.2d at 967. That principle applies even when the administrative process could not even resolve the constitutional claim, as long as the claim could be considered later upon judicial review. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994). The process of "[p]roceeding through the agency in this way provides the agency the opportunity to reconsider its policies, interpretations, and regulations in light of those challenges." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529

U.S. 1, 24 (2000).[8] It also affords responsible decision-makers an opportunity to address the matter in the first instance and grant relief on non-constitutional grounds, perhaps informed by principles of constitutional avoidance, thereby obviating any occasion for addressing a constitutional claim in court.

As noted above, petitioner could have sought to resolve his claims through the grievance procedure negotiated by the FAA and petitioner's union. See *National Agreement Between the Nat'l Ass'n of Gov't Employees and the FAA* art. 13 (May 26, 1998).[9] If that procedure did not resolve petitioner's various grievances, his union could have invoked binding arbitration. See *id.* art. 14; 5 U.S.C. 7121(b)(1)(C)(iii) (requiring CBAs to contain provisions for binding arbitration). And petitioner's union could have sought review of the arbitrator's decision from the FLRA. 5 U.S.C. 7122. To the extent that petitioner alleged a prohibited personnel practice (Pet. 15 n.6; Pet. App. 10a), he had a choice of either seeking corrective action from the Office of Special Counsel (5 U.S.C. 1211-1218; 49 U.S.C. 40122(g)(2)(H)), or pursuing a grievance and seeking equitable relief, if necessary, from the arbitrator (5 U.S.C. 7121(b)(2)(A)(i) (authorizing arbitrator to stay personnel

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[8] Accord *Sturm, Ruger & Co.* v. *Chao*, 300 F.3d 867, 874 (D.C. Cir. 2002); *Association of Civilian Technicians, Tony Kempenich Mem'l Chapter 21* v. *FLRA*, 269 F.3d 1119, 1122 (D.C. Cir. 2001).

[9] The CBA that covered petitioner at all times relevant to this litigation is *available at* http://www.faa.gov/ahr/policy/agree/agrees/term/nage/nage.cfm.

actions)).[10] See 5 U.S.C. 7121(g) (requiring election of remedies).

If at the conclusion of the administrative process petitioner were dissatisfied with the result, and if he believed a constitutional issue remained, he could have brought a suit at *that* time arguing that the court should consider his constitutional claim. At that point, the court could have the benefit of a final decision on all of petitioner's claims after full administrative process, the asserted constitutional claim would be brought more sharply into focus, and arguments concerning judicial review could address not only whether equitable relief is available at all, but also in what forum such relief might be sought, cf. *American Fed'n of Gov't Employees* v. *Loy*, 367 F.3d 932, 936-937 (D.C. Cir. 2004), what the conditions for obtaining any such relief might be, and the nature and scope of judicial review if it might be available in certain circumstances. This case, by contrast, comes to the Court presenting the issue of the availability of judicial review for constitutional claims in the

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[10] Petitioner contends (Pet. 15 n.6) that the court of appeals erred in holding that petitioner could seek corrective action from the Office of Special Counsel for prohibited personnel practices. He notes that the prohibited personnel practices provisions of Title 5 do not generally apply to FAA employees and that OSC's web site indicates that it only has jurisdiction over complaints of FAA employees alleging retaliation for whistleblowing. Petitioner's contention is mistaken. 49 U.S.C. 40122(g)(2)(H) makes applicable to the FAA 5 U.S.C. 1214, which directs the Special Counsel to "receive any allegation of a prohibited personnel practice and [to] investigate the allegation." 5 U.S.C. 1214(a)(1)(A). Although the FAA is not subject to the prohibited personnel practices listed in the CSRA at 5 U.S.C. 2302(a), the FAA Personnel Management System has its own list of prohibited personnel practices, which are a subset of those contained in the CSRA, *FAA Pers. Mgmt. Sys.* intro. § VIII. 49 U.S.C. 40122(g)(2)(H) thus authorizes the Special Counsel to investigate allegations by FAA employees of prohibited personnel practices.

abstract. Even if the issue otherwise might warrant certiorari at some point, the Court should await a case in which the applicable administrative procedures have been invoked and there is a final decision under those procedures.[11]

Review also is not warranted because the constitutional claim petitioner actually asserted in this case is insubstantial. Even construing petitioner's pro se complaint and motion to amend his complaint liberally, see *Hughes* v. *Rowe*, 449 U.S. 5, 15 (1980) (per curiam), the only constitutional claim petitioner has raised is that the FAA violated a right to privacy he asserts under the First Amendment by subjecting him to a make-up drug urinalysis test at work on September 25, 2002, which he claimed was the equivalent of an involuntary test performed at his home outside of working hours. C.A. Supp. E.R. 31 ("The incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample."). There is no

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[11] To be sure, petitioner no more exhausted his statutory claims than his constitutional ones. Nonetheless, the failure to exhaust his constitutional claims counsels against plenary review for two reasons, neither of which applies to the statutory claims. First, to the extent that petitioner suggests (for the first time in this Court) that constitutional avoidance principles require greater review of constitutional claims, similar considerations might have informed the nature of the bypassed administrative review or the extent of judicial review after administrative remedies were exhausted. Neither of those issues—which could inform the availability of *de novo* judicial review in district court—has been explored in this case. Second, in light of the failure to exhaust, petitioner would not be entitled to relief even if the Court adopted the D.C. Circuit's variant of the rule petitioner seeks. See p. 23, *supra* (discussing *Steadman*). With respect to the statutory question, by contrast, it does not appear that the courts of appeals have focused on the need to exhaust.

basis for a First Amendment claim in those circumstances. The complaint does *not* contend that the alleged lack of randomness in testing or any other aspects of the testing program generally violated the Fourth Amendment or petitioner's constitutional rights to equal protection or due process of law.

Moreover, petitioner has presented no argument in any of his filings in the courts below, nor pointed to any facts in the record, to suggest how the make-up test could have violated his privacy rights. See Pet. C.A. Br. 19 (simply asserting that test violated his "First Amendment right to privacy"); *id.* at 22; see also Plaintiff's Opp. to Def. Mot. to Dismiss 7-8. This Court has made clear that "the expectations of privacy of * * * employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety," *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 626-627 (1989), and has held that breath, blood, and urine testing for drug use does not impermissibly interfere with railroad employees' Fourth Amendment privacy interests. *Ibid.* Petitioner does not contest that air travel, like railroad transportation, is heavily regulated to ensure safety, nor does he contest that, as an Air Traffic Assistant, petitioner is an employee "whose duties include responsibility for safety-sensitive functions." 49 U.S.C. 45102(b). In light of petitioner's diminished expectation of privacy, he has pointed to nothing to suggest that subjecting him to a make-up urinalysis test at work violated his privacy interests. Such an insubstantial claim would not even implicate the concerns petitioner presents that a "'serious constitutional question' * * * would arise if a federal statute were construed to deny any judicial forum *for a colorable constitutional claim*.'" Pet. 25 (quoting *Webster* v. *Doe*, 486 U.S. at 603) (emphasis added).

For the foregoing reasons, this case does not present a suitable vehicle for considering whether judicial review might be available in some circumstances in some forum to obtain equitable relief for an alleged constitutional violation where judicial review is not otherwise provided under the comprehensive regime of the CSRA itself.

CONCLUSION

The petition for a writ of certiorari should be granted limited to the first question presented by the petition.

Respectfully submitted.

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IN THE

Supreme Court of the United States

Terry L. Whitman,

Petitioner,

v.

U.S. Department of Transportation, *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
I. The Second Question Presented Implicates A Longstanding Circuit Split On A Question Of Substantial Importance 1
II. There Are No Vehicle Problems That Counsel Against Resolving The Circuit Split In This Case 3
CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Crull v. *Gem Ins. Co.*, 58 F.3d 1386 (CA9 1995) 6
Albert v. *Carovano*, 851 F.2d 561 (CA2 1988) 6, 7
Bush v. *Lucas*, 462 U.S. 367, 368 (1983) 5
Deleware v. *Prouse*, 440 U.S. 648 (1979) 8
Exxon Mobil Corp. v. *Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005) 5
Harrell v. *Cook*, 169 F.3d 428 (CA7 1999) 6
Hughes v. *Rowe*, 449 U.S. 5 (1980) 5
Michigan Dep't of State Police v. *Sitz*, 496 U.S. 444 (1990) 8
Mitchum v. *Hurt*, 73 F.3d 30 (CA3 1995) 3
National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 8
Pinar v. *Doe*, 747 F.2d 899 (CA4 1984) 2
Rasul v. *Bush*, 124 S. Ct. 2686 (2004) 5
Saul v. *United* States, 928 F.2d 829 (CA9 1991) 4
Skinner v. *Railway Labor Executive Association*, 489 U.S. 602 (1989) 7, 8
Steadman v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963 (CADC 1990) 2, 3
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 5
Tolle v. *Carroll Touch, Inc.*, 977 F.2d 1129 (CA7 1992) 7
United States v. *Fausto*, 484 U.S. 439, 440-41 (1988) 5
Vernonia School Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 8

Statutes

Civil Service Reform Act, 5 U.S.C. 7101 *et seq.* 1

Rules

Fed. R. Civ. P. 8(a) 6

Treatises

J. Moore et al., Moore's Federal Practice 6

REPLY BRIEF FOR THE PETITIONER

The petition for certiorari in this case seeks review of two closely related questions concerning the availability of a judicial forum to adjudicate federal statutory and constitutional claims by federal employees. The first question asks whether the Civil Service Reform Act (CSRA), 5 U.S.C. 7101 *et seq.*, precludes direct judicial redress for violations of the rights of federal employees when the law otherwise provides an independent basis for judicial review of that claim. The second question concerns a subset of such suits, asking whether the CSRA precludes a claim for equitable relief to remedy a violation of a federal employee's *constitutional* rights.

The Solicitor General agrees that both questions are the subject of circuit splits, that both questions are important and frequently recurring, and that both questions implicate fundamental interests of federal employees and agencies alike. See Brief for the Respondents (Resp.) 19-23. For those reasons, the Solicitor General agrees that this Court should grant certiorari on the first question presented and determine whether the CSRA precludes petitioner from seeking judicial review of an alleged violation of his federal statutory rights. Resp. 11.

The Solicitor General nonetheless urges this Court to leave unresolved the split of authority over whether the CSRA precludes the same employee from seeking an injunction in federal court to remedy a violation of his federal *constitutional* rights. Resp. 23. That suggestion should be rejected and the petition for certiorari granted in its entirety.

I. The Second Question Presented Implicates A Longstanding Circuit Split On A Question Of Substantial Importance.

The Solicitor General agrees that "the courts of appeals have reached different conclusions" regarding whether federal courts have jurisdiction to enjoin violations of federal

employees' constitutional rights. Resp. 22. That division is longstanding and intolerable. To take just one example, the Solicitor General acknowledges that the Fourth and D.C. Circuits apply conflicting rules. *Id.* 22-23 (citing *Pinar* v. *Doe*, 747 F.2d 899, 909-12 (CA4 1984) (federal courts lack jurisdiction to issue injunctive relief for violations of federal employees' constitutional rights); *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (CADC 1990) (permitting such suits after claim is exhausted through administrative grievance process)). Given the predominance of federal employment and the dispersion of federal agencies throughout the D.C. metropolitan area, this division of authority will predictably result in disparate treatment of claims brought by similarly situated employees (and perhaps even employees from the same agency) depending on whether the claim proceeds in Maryland, the District of Columbia, or Virginia. This is precisely the type of "untenable lack of uniformity in federal employment law," Resp. 21, that led the Solicitor General to urge review of the first question presented.

Nor does the Solicitor General contest that the second question, like the first, presents "a recurring issue of considerable practical importance both to the Nation's largest employer and its employees." Resp. 20. The Government's interest in avoiding the burdens of litigation, securing the benefits of arbitration, and remedying the lack of uniformity in the law, *ibid.*, equally support granting certiorari to resolve whether an employee may seek direct judicial review of employment decisions that implicate federal constitutional rights. The burdensomeness of litigation does not depend on the source of the employee's rights, the benefits of arbitration do not change depending on the nature of the employees' claims, and the lack of uniformity in federal employment law is no more tenable simply because the circuit split concerns the process for adjudicating constitutional rather than statutory claims.

Even if the Government would prefer to leave the question unresolved, federal employees and the lower federal courts have a substantial interest in eliminating the existing uncertainty over which, if any, claims by federal employees may be made directly in federal court and which may only be pursued through the CSRA administrative mechanisms. Moreover, employees' interest in the availability of a judicial remedy for violations of fundamental constitutional rights is at least as strong as their interest in securing review of employment actions that infringe on their rights under federal statutes.

II. There Are No Vehicle Problems That Counsel Against Resolving The Circuit Split In This Case.

The Solicitor General thus does not contest that the second question warrants review by this Court. See Resp. 23. Instead, the brief for respondents asserts that two aspects of the pending case make it a less than ideal vehicle for resolving the question: petitioner's failure to present his claims through a grievance to the agency, *ibid.*, and the purported weakness of petitioner's constitutional claim on the merits, *id.* 26. Neither assertion provides a reason for delaying resolution of the circuit split.

Petitioner's failure to exhaust his claim through his agency's negotiated grievance procedure is no ground for denying certiorari on the question *whether petitioner was required to adjudicate his claim through that process in the first place*. The Solicitor General acknowledges that the Third Circuit permits federal employees to proceed directly to federal court to enjoin a violation of their constitutional rights. See Resp. 23 (discussing *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (1995)). It is true that the D.C. Circuit applies a different rule, requiring exhaustion prior to seeking a judicial remedy. See *Steadman*, 918 F.2d at 967. But this Court should not decline to resolve a circuit split simply because petitioner's claims would fail under the rule applied by one side of the division. This is particularly so when neither

petitioner nor respondents have endorsed the exhaustion rule of the D.C. Circuit.

Nor is it likely that the administrative process would have "brought more sharply into focus," contra Resp. 25, any aspect of the question for which review is sought in this case. The legal question whether petitioner could pursue his claim in district court would not have been addressed in the administrative proceedings, and no party has suggested that the availability of judicial review should turn on any of the factual questions that might have been resolved in the grievance process.[1]

Second, the Solicitor General argues that review should be denied because petitioner's constitutional claim "is insubstantial." Resp. 26. That assertion is incorrect, see *infra*, but even if it were not, the merits of petitioner's claim are entirely distinct from the question whether the district court has jurisdiction to adjudicate it. See, *e.g.*, *Steel Co.* v.

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[1] The Solicitor General suggests in a footnote that some of petitioner's arguments in favor of judicial review "might have informed the nature of the bypassed administrative review," Resp. 26 n.11, but does not describe how that possibility has any relevance to whether petitioner was required to bring his claims through the administrative process in the first place. The Solicitor General further intimates that these same arguments might have led a court to allow judicial review of petitioner's claims after exhaustion of administrative remedies. *Ibid.* That assertion is implausible as a factual matter. As the Solicitor General recognizes, *id.* 25, the Ninth Circuit's established precedents preclude any judicial review of constitutional claims outside the limited provisions of the CSRA. See, *e.g.*, *Saul* v. *United* States, 928 F.2d 829, 843 (1991). The Solicitor General does not contend that the Ninth Circuit rule is wrong and is careful not to state that petitioner's claims fall within the limited set of grievances entitled to eventual judicial review under the CSRA. See Resp. 25-26 & n.11. At any rate, this Court may consider for itself the extent to which petitioner's arguments favor permitting suits for injunctive relief, with or without an exhaustion requirement.

Citizens for a Better Env't, 523 U.S. 83, 89 (1998). This Court routinely grants certiorari limited to such jurisdictional questions. See, *e.g.*, *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004). Indeed, this Court has previously granted certiorari to decide whether the CSRA precluded jurisdiction over particular types of cases without considering the merits of the plaintiff's claims. See *United States* v. *Fausto*, 484 U.S. 439, 440-41 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 368, 372 n.7 (1983).

In any case, petitioner's constitutional claim is substantial. In asserting otherwise, the Solicitor General fundamentally misconstrues the nature of the claim.[2] First, the Solicitor General asserts that the alleged violation arises solely from the "make-up drug urinalysis test at work on September 25, 2002," rather than from the entire course of non-random treatment alleged in the complaint. Resp. 26. Second, the Solicitor General argues that petitioner's constitutional claim is grounded solely in the First Amendment, to the exclusion of petitioners' rights under "the Fourth Amendment or petitioner's constitutional rights to equal protection or due process of law." *Id.* 27. There is no basis for reading either limitation into petitioner's *pro se* complaint. "It is settled law that the allegations of such a complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Hughes* v. *Rowe*, 449 U.S. 5, 9-10 (1980) (citations omitted). "Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 10.

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[2] The Solicitor General's additional objection that petitioner has not "pointed to any facts in the record" to support his claim, Resp. 27, is baseless, given that this case was resolved on the Government's motion to dismiss at the outset of the litigation. Pet. App. 1a-2a.

Moreover, "[t]he pleadings need only identify the basis of the court's jurisdiction, demand for judgment for the relief sought, and contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. P. 8. The pleadings need not identify any particular legal theory under which recovery is sought." *Crull* v. *Gem Ins. Co.*, 58 F.3d 1386, 1391 (CA9 1995). See also 2 J. Moore et al., Moore's Federal Practice § 8.04[3] ("Rule 8(a)(2) does not require a claimant to set forth any legal theory justifying the relief sought on the facts alleged, but does require sufficient factual averments to show that the claimant may be entitled to some relief." (collecting cases)).

Construed in light of these principles, petitioner adequately challenges the constitutionality of the entire course of the Government's conduct under the First, Fourth and Fourteenth Amendments. The original complaint begins by asserting "violations of my rights" arising from "misapplication of the Agency's random substance testing program which have resulted in my being tested an inordinate number of times, my selection from an 'alternate list' to replace employees already selected for testing, and in the denial of my rights to representation of my choosing while being tested." C.A. Supp. E.R. 7. The balance of the complaint sets forth the factual basis for these assertions in considerable detail, *id.* 8-11, and petitioner's request for injunctive relief, *id.* 11. The Solicitor General asserts that petitioner's motion to amend the complaint limited petitioner's constitutional claims to the September 25, 2002 make-up drug test, Resp. 26, but that motion simply sought to add additional factual support for petitioner's original claims, describing an incident that occurred after the filing of the original complaint. See C.A. Supp. E.R. 23-31.

Petitioner was not required to set forth in either document the legal theory of his complaint. See Fed. R. Civ. P. 8(a); *Crull*, 58 F.3d at 1391; *Harrell* v. *Cook*, 169 F.3d 428, 432 (CA7 1999); *Albert* v. *Carovano*, 851 F.2d 561, 571 n.3 (CA2 1988) (en banc). Accordingly, it makes no difference that

petitioner mentioned a statutory provision supporting his claim in the original complaint, C.A. Supp. E.R. 7, and the First Amendment in his motion to amend, *id.* 31. "[A] complaint need not point to the appropriate statute or law in order to raise a claim for relief under Rule 8 of the Federal Rules of Civil Procedure." *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (CA7 1992). Moreover, "a complaint sufficiently raises a claim even if it points to no legal theory or even if it points to the wrong legal theory as a basis for that claim, as long as 'relief is possible under any set of facts that could be established consistent with the allegations.'" *Ibid.* (citation omitted). See also *Carovano*, 851 F.2d at 571 n.3 (same).

Properly construed, petitioner's complaint presents a serious constitutional claim. Petitioner does not contest that the Government has a substantial interest in transportation safety and does not challenge the Government's right to conduct systematic or truly random drug testing of FAA employees. The constitutional question posed by petitioner's complaint is whether arbitrary, *non*-random testing, unsupported by *any* basis for individualized suspicion, is consistent with the Constitution. The Solicitor General fails to identify any decision by this Court, or any other, that permits such serious, stigmatizing invasions of privacy with so little justification. The only relevant case cited in respondents' brief, *Skinner* v. *Railway Labor Executive Association*, 489 U.S. 602 (1989), is not on point. In that case, this Court upheld the Federal Railroad Administration's practice of conducting drug and alcohol tests of employees involved in accidents and safety violations. *Id.* at 633-34. That case did not, however, purport to authorize an agency to arbitrarily subject particular employees to non-random drug testing without any basis for individualized suspicion.

To the contrary, this Court's cases demonstrate that even when a government has a sufficiently compelling interest (such as transportation safety) to allow an exception to the constitutional prohibition against suspicionless searches, it

must conduct those searches systematically, see *Skinner*, 489 U.S. at 629-30; *Deleware* v. *Prouse*, 440 U.S. 648, 663 (1979), or randomly, see *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 650 (1995). What the government may *not* do – and what petitioner alleges it has done in this case – is subject citizens to searches based on the "standardless and unconstrainted discretion" of government officials. *Prouse*, 440 U.S. at 661. Thus, while this Court has upheld sobriety checkpoints that stop all oncoming traffic for inspection, see *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 447-48 (1990), it has held unconstitutional "discretionary spot checks" of motorists because they expose citizens to precisely the type of "unbridled discretion of law enforcement officials" the Fourth Amendment was enacted to prevent, *Prouse*, 440 U.S. at 661. Similarly, whenever this Court has upheld a suspicionless drug testing practice, the testing was actually random, see *Vernonia*, 515 U.S. at 650 (random drug tests for student athletes), or subjected all similarly situated employees to testing in a systematic manner, see *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 660-61 (1989) (test required for all new employees and those seeking transfers); *Skinner*, 489 U.S. at 606 (testing employees involved in train accidents or safety violations). See also *Von Raab*, 489 U.S. at 672 n.2 (noting that such procedures "do not carry the grave potential for 'arbitrary and oppressive interference with the privacy and personal security of Individuals' that the Fourth Amendment was designed to prevent") (citation omitted).

* * * * *

The petition in this case affords this Court the opportunity to provide a definitive answer to what types of federal employee claims, if any, the federal courts have jurisdiction to hear. That question is important and has splintered the courts of appeals, some finding no jurisdiction over any claim, some finding jurisdiction over all claims, some finding jurisdiction only over requests for injunctive relief from constitutional violations. To conclusively resolve

that division, this Court must grant certiorari for both questions presented in this petition. Deciding only the first question, as urged by the Solicitor General, will leave intact a large part of the division and uncertainty that has burdened the courts, the Government, and federal employees for more than a decade. Further delay is unwarranted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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No. 04-1131

IN THE
Supreme Court of the United States

Terry L. Whitman,
Petitioner,

v.

U.S. Department of Transportation; Norman Y. Mineta, U.S. Secretary of Transportation
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ALLEN DOTSON IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT. 3
ARGUMENT. 3
I. THE CSRA DOES NOT PRECLUDE FEDERAL COURTS FROM GRANTING EQUITABLE RELIEF FOR CONSTITUTIONAL VIOLATIONS.. 3
A. Courts May Award Equitable Relief For Constitutional Violations Because The CSRA Does Not Explicitly Bar Such Relief.. 3
B. Because The CSRA's Remedial Provisions Apply Only To Executive Branch Employees, The CSRA Does Not Impliedly Preclude Courts From Awarding Equitable Relief To Judicial Branch Employees.. 7
1. The CSRA's Administrative And Judicial Remedies Do Not Apply To Judicial Branch Employees.. 8
2. Equitable Remedies Must Be Provided To Judicial Branch Employees, Who Are Otherwise At Risk Of Being Left Without A Remedy For Constitutional Violations 9
II. IF THIS COURT DOES NOT REACH THE SECOND QUESTION PRESENTED IN *WHITMAN*, IT SHOULD GRANT DOTSON'S PETITION TO RESOLVE THAT QUESTION... 11
CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Commission,
329 F.3d 1235 (11th Cir. 2003) 12
Bell v. Hood, 327 U.S. 678 (1946) 4
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 1, 5, 10, 12
Bowen v. Michigan Acad. of Family Physicians,
476 U.S. 667 (1986) 4
Bush v. Lucas, 462 U.S. 367 (1983) 5, 6, 7
Carlson v. Green, 446 U.S. 14 (1980) 4, 5
Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997) 10, 11
Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869) 5
Ex parte Young, 209 U.S. 123 (1908) 4, 6
Fausto v. United States, 484 U.S. 439 (1988) 6, 8
Forrester v. White, 484 U.S. 219 (1988) 10, 11
Hubbard v. EPA, 809 F.2d 1 (D.C. Cir. 1986) 5, 12
Krueger v. Lyng, 927 F.2d 1050 (8th Cir. 1991) 11
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 3, 5
Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995) 5, 6
Mudge v. United States,
308 F.3d 1220 (Fed. Cir. 2002) 12
Osborn v. United States Bank,
22 U.S. (9 Wheat.) 738 (1824) 4, 6
Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) 5
Webster v. Doe, 486 U.S. 592 (1988) 4, 9

Statutes

5 U.S.C. 2103(a) 8
5 U.S.C. 2302(a)(2)(A) 8
5 U.S.C. 2302(b) 8
5 U.S.C. 2302(d) 8
5 U.S.C. 4301(1) 8
5 U.S.C. 4301(2) 8
5 U.S.C. 7121(a)(1) 11, 12

Other Authorities

Elizabeth A. Wells, Note, "Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?" 90 Mich. L. Rev. 2612, 2645 (1992) 4
Gene R. Nichols, "*Bivens*, *Chilicky*, and Constitutional Damages Claims," 75 Va. L. Rev. 1117 (1989) 4

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Allen Dotson has a direct interest in this case because it concerns an issue very similar to one raised in his pending petition for a writ of certiorari. *See Dotson v. Griesa*, No. 04-1276 (filed March 22, 2005). The second question presented in *Whitman* is whether the Civil Service Reform Act ("CSRA"), 92 Stat. 1111 *et seq.*, precludes federal courts from granting equitable relief for constitutional claims brought by federal employees against their employer, which is identical to the first question presented in Dotson's petition.

Dotson is an African-American who was employed for ten years as a probation officer in the Southern District of New York until his termination in December 1997. Complaint ¶¶ 4, 10-11. He brought an action pursuant to 42 U.S.C. 1981 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against judges and probation officers responsible for his dismissal, seeking damages and equitable remedies for violations of his constitutional right not to be discriminated against on the basis of his race and his right to due process. The district court dismissed his constitutional claims on the ground that the CSRA implicitly precludes federal courts from granting either damages or equitable relief for constitutional injuries, even though the CSRA's remedies

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of the Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation and submission of the brief.

are available only to executive branch employees, and not judicial branch employees such as Dotson.

The Court of Appeals for the Second Circuit affirmed, but recognized that the circuits are split on the availability of equitable relief for constitutional violations and noted that "sound arguments can be mustered both in favor of and against preclusion of a federal employee's equitable challenge to employment discrimination." Dotson Pet. App. 45a.

The only potentially relevant difference between Dotson's and Whitman's cases is that Dotson is an employee of the judicial branch, while Whitman is an employee of the executive branch. Although the CSRA provides some administrative and judicial remedies for executive branch employees, these remedies do not apply to judicial branch employees, who thus have no statutory recourse for violations of their constitutional rights.

Dotson participates as *amicus* here to support petitioner's contention that the CSRA does not preclude a court from granting equitable relief for constitutional violations suffered by *any* employee covered by the CSRA, and also to emphasize that construing the Act to preclude judicial employees such as Dotson from such relief is particularly anomalous – and constitutionally troubling – in light of the CSRA's complete exclusion of judicial branch employees from any of the protections provided other employees. In addition, Dotson notes the possibility that this Court will not reach the second question presented in *Whitman*, and respectfully suggests that this Court grant his petition if it does not resolve that question in *Whitman*.

SUMMARY OF ARGUMENT

I. The judiciary plays a vital role in enforcing constitutional limits on government power by enjoining unconstitutional conduct. This equitable power has long been recognized as more significant, and more essential to the constitutional structure, than the courts' authority to award damages for constitutional violations. Because the CSRA contains no clear statement by Congress purporting to foreclose equitable remedies for constitutional violations, the Act should not be read as displacing courts from their traditional role as guarantors of constitutional limits on government conduct. Moreover, because the CSRA's administrative and judicial remedies apply only to executive branch employees, and not judicial branch employees, it would be particularly troubling to read the Act as foreclosing equitable relief for these employees.

II. If this Court does not reach the question whether the CSRA implicitly precludes courts from awarding equitable relief for constitutional violations in this case, Dotson respectfully requests that this Court grant his petition to resolve a question that has long split the U.S. courts of appeals.

ARGUMENT

I. THE CSRA DOES NOT PRECLUDE FEDERAL COURTS FROM GRANTING EQUITABLE RELIEF FOR CONSTITUTIONAL VIOLATIONS.

A. Courts May Award Equitable Relief For Constitutional Violations Because The CSRA Does Not Explicitly Bar Such Relief.

Courts should not construe statutes to preclude equitable relief for constitutional violations absent a clear statement by Congress that it intended to do so. Moreover, the question whether Congress can deprive individuals of *all* judicial remedies for constitutional violations raises serious constitutional questions. *See Marbury v. Madison*, 5 U.S. (1

Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.") Because the CSRA contains no clear statement precluding an award of equitable relief, the Ninth Circuit erred in reaching this constitutionally troubling result by construing the CSRA to preclude all remedies for constitutional violations. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (construing statute to permit judicial review of constitutional claims and thereby "avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (quoting *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

This Court has long recognized a distinction between legal and equitable relief for constitutional claims and has noted the federal courts' established tradition of awarding the latter. *See, e.g., Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *Carlson v. Green*, 446 U.S. 14, 42 (1980) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established.") (Rehnquist, J., dissenting); *Ex parte Young*, 209 U.S. 123 (1908); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824); *see also* Elizabeth A. Wells, Note, "Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?" 90 Mich. L. Rev. 2612, 2645 (1992) (equitable remedies should be allowed under the CSRA); Gene R. Nichols, "*Bivens*, *Chilicky*, and Constitutional Damages Claims," 75 Va. L. Rev. 1117 (1989) (noting that the Court has drawn a distinction between legal and equitable relief for constitutional violations).

For this reason, two circuits have held that equitable relief is available for employees who are suffering an ongoing

constitutional violation. In *Hubbard v. EPA*, 809 F.2d 1 (D.C. Cir. 1986), the D.C. Circuit declared that although the CSRA precluded a covered employee from pursuing a *Bivens* action for money damages, it did not bar his claim for injunctive relief. The court explained:

> The courts' power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals. *Bivens* actions are a recent judicial creation and, as *Carlson v. Green*[, 446 U.S. 14 (1990),] made clear, comparatively easy for Congress to preempt. The court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)). Although Congress may limit this power, *see Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869), CSRA did not explicitly limit our jurisdiction to enjoin unconstitutional personnel actions by federal agencies.

809 F.2d at 11 n.15, *reaff'd in relevant part en banc*, *Spagnola v. Mathis*, 859 F.2d 223, 230 (D.C. Cir. 1988) ("[T]ime and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights.")

The Third Circuit joined the D.C. Circuit in *Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995). *Mitchum* concerned employees who sued the Veterans Administration Medical Center ("VAMC") claiming that the VAMC administrators had violated their First Amendment rights by retaliating against them for statements they made about patient care. The employees sought injunctive and declaratory relief. The VAMC responded that their claims were preempted by the CSRA, citing *Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush*, this Court had rejected a federal employee's *Bivens* action for *damages* on the ground that the "comprehensive procedural and

substantive provisions" of the CSRA are "special factors counselling hesitation in the absence of affirmative action by Congress." *Mitchum*, 73 F.3d at 31, 34 (citing *Bush*, 462 U.S. at 368, 377).

The Third Circuit rejected the VAMC's argument that *Bush*'s refusal to permit damages awards precluded courts from awarding injunctive relief as well. The Third Circuit began by observing that federal courts have long had the power to grant equitable relief for constitutional violations. *Mitchum*, 73 F.3d at 35 (citing *Osborn*, 22 U.S. at 838-46, 859 and *Ex parte Young*, 209 U.S. 123). The Third Circuit stated that, although Congress could choose *explicitly* to restrict the availability of injunctive relief, courts "should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights." *Id.* Accordingly, the Third Circuit held that the VAMC employees could pursue their claims for equitable relief for violation of their constitutional rights.

The First, Second, Ninth, and Tenth Circuits have concluded that the CSRA bars the award of equitable relief because they misread this Court's precedents in *Bush*, 462 U.S. 367 and *Fausto v. United States*, 484 U.S. 439 (1988). Respondents mistakenly rely on these cases in their Brief in Opposition to argue that equitable relief is barred by the CSRA. Whitman Brief in Oppostion at 14-16. *Fausto* is particularly inapposite because it concerned only the question whether the CSRA prohibits statutory relief under the Back Pay Act, and not whether the CSRA bars remedies for deprivations of constitutional rights. *See* 484 U.S. at 455 (Blackman, J, *concurring*) (noting that the case did not raise the question whether courts could grant equitable relief for a constitutional violation). Thus, *Fausto* has no bearing on the question

whether the CSRA implicitly bars courts from awarding equitable relief for constitutional violations.

In *Bush*, this Court held that the CSRA precludes constitutional claims for damages because Congress's provision of comprehensive remedies under the CSRA suggests that Congress did not want courts to award alternative legal remedies. That decision does not support the conclusion that the CSRA prohibits the award of equitable relief as well, however, because it addressed only the availability of legal, and not equitable, remedies. As discussed above, the longstanding distinction between the two types of remedies, and the need to have some safety valve to protect citizens from violation of their constitutional rights, requires that the CSRA be construed to allow courts to award equitable relief for constitutional violations.

B. Because The CSRA's Remedial Provisions Apply Only To Executive Branch Employees, The CSRA Does Not Impliedly Preclude Courts From Awarding Equitable Relief To Judicial Branch Employees.

The Second Circuit's denial of equitable relief in *Dotson* is even more troubling than the Ninth Circuit's decision in *Whitman* because it involved a judicial employee who is not covered by *any* of the administrative and judicial remedies Congress provided to executive branch employees under the CSRA. Because Congress legislated specific remedies *only* for executive branch employees, those statutory remedies do not impliedly prohibit courts from awarding equitable relief for constitutional violations suffered by judicial employees. Furthermore, recourse to the judicial system is even more of a constitutional imperative for judicial employees than for the executive branch employees – who are statutorily-guaranteed at least some protections of their constitutional rights.

1. The CSRA's Administrative And Judicial Remedies Do Not Apply To Judicial Branch Employees.

The CSRA divides civil service personnel into three main categories: the senior executive service, the competitive service, and the excepted service. Dotson Pet. App. in No. 04-1276, at 10a-11a. Employees of the judicial branch, including probation officers such as Dotson, are excepted service personnel. *Id.* 11a (citing 5 U.S.C. 2103(a)).

Chapters 23, 43, and 75 of the CSRA "afford detailed procedural protections to civil service employees who experience adverse employment actions." Dotson Pet. App. 11a. None of those chapters applies to judicial employees such as Dotson, however. *Id.* 11a-15a.

Chapter 23 forbids an agency from engaging in certain "prohibited personnel practices," including unlawful discrimination based on race. 5 U.S.C. 2302(b). In addition, it preserves federal employees' rights to bring an action in district court under Title VII for racial discrimination. 5 U.S.C. 2302(d). Excepted service personnel are generally covered by Chapter 23. Because Chapter 23's protections apply only to "'employee[s] in, or applicant[s] for, a covered position in an *agency*,'" however, it does not cover Dotson, who works for the judiciary, not an agency. Dotson Pet. App. 12a (citing 5 U.S.C. 2302(a)(2)(A)) (emphasis in original).

Chapter 43 "'governs personnel actions based on unacceptable job performance.'" Dotson Pet. App. 13a (quoting *Fausto*, 484 U.S. at 445). Section 4301(2) defines "employee" as an "individual employed in or under an agency," and section 4301(1) defines an "agency" as an "executive agency." Pet. App. 13a. Accordingly, Chapter 43 also does not apply to a judicial employee such as Dotson.

Chapter 75 provides procedural protections for employees who face adverse personnel action for behavior that will

interfere with the "efficiency of the service" (such as discourteous or disruptive behavior). Dotson Pet. App. 13a (quoting *Fausto*, 484 U.S. at 445). Again, judicial employees like Dotson do not qualify for Chapter 75's protections because that Chapter does not apply to probation officers. *Id.* 15a.

In reviewing Dotson's remedies under the CSRA, the Second Circuit concluded:

> In sum, while the CSRA meticulously categorizes the thousands of federal civil service employees into three categories and provides a detailed and comprehensive means for addressing their employment grievances, it provides no administrative or judicial review rights for non-preference eligible excepted service personnel serving in the judicial branch such as Dotson.

Dotson Pet. App. 15a.

2. Equitable Remedies Must Be Provided To Judicial Employees, Who Are Otherwise At Risk Of Being Left Without Any Remedy For Constitutional Violations.

The fact that statutory protections available to executive branch employees do not apply to judicial employees makes it more difficult to read the CSRA to impliedly prohibit equitable relief for these employees, as well as more constitutionally troubling to do so. Yet, according to the Second Circuit, Congress's failure to provide remedies for judicial employees under the CSRA meant that Congress intended to exclude these employees even from the judiciary's longstanding authority to correct constitutional violations through injunctive relief. That conclusion cannot be squared with this Court's stated reluctance to find that Congress has intentionally deprived individuals of any remedy for constitutional harms. *See, e.g., Webster*, 486 U.S. at 603.

In their opposition to Dotson's petition, the respondents argued that no such constitutional problems arise from this construction of the statute because the judicial branch has voluntarily adopted administrative remedies – a Model EEO Plan – that provide for the equitable relief (reinstatement) that Dotson sought. Dotson Brief in Opposition 15-16. The Model EEO Plan provides for hearings by a designated judicial officer who has "broad discretion to provide 'such discovery and investigation as is necessary.'" Dotson Pet. App 35a-36a. The employee has the right to be represented by counsel, present evidence, and cross examine witnesses at these hearings. *Id.* 36a. The judicial officer has the power to award relief, and there is the opportunity for appellate review before the judicial council of the circuit. *Id.* Respondents claim that the plan provides for a "judicial forum" and ensures that employees have "'one or more levels of judicial review'" Dotson Brief in Opposition 17 (quoting Dotson Pet. App. 48a).

As a threshold matter, the Model EEO Plan is entirely voluntary and is the creation of the judicial branch, not Congress; thus, its existence cannot be read as a reflection of *Congress's* intent to preclude an award of equitable relief from an Article III judge. *See Duffy v. Wolle*, 123 F.3d 1026, 1034-35 (8th Cir. 1997) (rejecting the argument that the judiciary's EEO Plan precluded *Bivens* remedies and holding that "*[o]nly Congress* has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action") (emphasis in original).

In any case, the review procedures available under the Model EEO Plan are not equivalent to presenting ones' case to an Article III judge acting in a judicial capacity. Judges review employee complaints under the EEO Plan in their role as supervisors of the probation office, not as Article III judges. *Cf. Forrester v. White*, 484 U.S. 219, 229-30 (1988) (in deciding to discharge probation officer, judge engages in

"administrative," not "judicial," act and thus is not entitled to absolute immunity); *Duffy*, 123 F.3d at 1034 (same). As this Court explained in *Forrester*, "a judge who hires or fires a probation officer cannot meaningfully be distinguished from . . . any [] Executive Branch official who is responsible for making such employment decision." *Id.* at 229. Moreover, the hearing in Dotson's case was before employees in, and judges who supervise, the very Probation Office that fired him – the epitome of a "hollow" remedy. *Krueger v. Lyng*, 927 F.2d 1050, 1056 (8th Cir. 1991) ("We note that the remedy made available to Krueger . . . is very limited, and indeed may even be characterized as 'hollow,' as the extent of his remedy is limited to appealing to the supervisor of those who fired him.").

Accordingly, respondents, like the Second Circuit, erred when contending that "[b]y suing in federal court, petitioner seeks only to have 'his claim reviewed by a different set of judicial officers' than those afforded to him by the courts' long-established administrative scheme." Dotson Brief in Opposition 17 (quoting Dotson Pet. App. 48a). Judicial branch employees whose constitutional rights have been violated seek review by an Article III judge *acting in his capacity as judge*, not in his capacity as supervisor of the probation office. Because Congress has not impliedly precluded such relief, and because the Model EEO Plan does not offer it, there is no basis for this Court to conclude that the CSRA precludes courts from awarding equitable relief to judicial branch employees.

II. IF THIS COURT DOES NOT REACH THE SECOND QUESTION PRESENTED IN *WHITMAN*, IT SHOULD GRANT DOTSON'S PETITION TO RESOLVE THAT QUESTION.

The first question presented in Whitman's petition concerns the Ninth Circuit's holding that 5 U.S.C. 7121(a)(1) *expressly* precludes judicial review when an employee's claim falls within matters subject to grievance procedures established

under a collective bargaining agreement. Petitioner Whitman argues, to the contrary, that Section 7121(a)(1) clearly gives federal courts jurisdiction to hear his claims – a conclusion supported by the Eleventh and Federal Circuits. *See* Whitman Petition at 12 ("On its face, Section 7121(a) does not preclude a federal employee's direct recourse to the federal courts; to the contrary, it leads to the inescapable conclusion that such recourse *is* available."); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002); *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Commission*, 329 F.3d 1235 (11th Cir. 2003).

If this Court were to conclude *either* that 5 U.S.C. 7121(a)(1) expressly precludes judicial review *or* that it clearly provides for such review, then it will not reach the second question in this case and the question raised in Dotson's petition, namely, whether the CSRA as a whole *implicitly* precludes federal employees from bringing a claim for injunctive relief for constitutional violations. In *Dotson*, the Second Circuit did not find that any provision in the CSRA expressly precluded judicial review. It held instead that "because the CSRA reflects a detailed and comprehensive system for dealing with federal employment concerns, federal courts will generally not attempt to supplement the relief afforded by that statute through other actions, including those implied under *Bivens* or derived from equity." Dotson Pet. App. 4a. Nor did the D.C. and Third Circuits' decisions holding that injunctive remedies are available for constitutional violations maintain that any statutory provision expressly allowed for judicial relief. Rather, those courts concluded that injunctive relief for constitutional violations was presumptively available when no other remedy was provided and Congress had not expressly precluded such relief. *See, e.g., Hubbard*, 809 F.2d at 11 n.15 (observing that the CSRA does not

"explicitly" preclude equitable relief for constitutional violations).

Thus, the question whether the CSRA impliedly precludes courts from awarding equitable relief might remain unresolved even after this Court issues its decision in this case. If that occurs, Dotson respectfully requests that this Court grant his petition to resolve this question that has long divided the circuit courts.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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No. 04-1131

IN THE

Supreme Court of the United States

TERRY L. WHITMAN,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES, AS *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

Page(s)

STATEMENT OF INTEREST.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT..... 6

ARGUMENT.....7

I. THE NINTH CIRCUIT UPSET A DELICATE BALANCE BETWEEN GOVERNMENT EMPLOYERS' FLEXIBILITY AND THE CONSTITUTIONAL AND STATUTORY RIGHTS OF PUBLIC SERVANTS.....7

A. The Ninth Circuit's Decision Leaves Many Federal Employees Without an Effective Remedy For Unconstitutional Government Conduct.....8

1. The CSRA's administrative remedies are no substitute for judicial review.....8

2. Non-CSRA employees may lack any forum, judicial or administrative, to redress violations of statutory or constitutional rights.....12

B. Unlike the Ninth Circuit's Decision, the Court's Precedents Preserve Agency-Employers' Flexibility While Still Enforcing Civil Servants' Constitutional Rights.....13

II. THE NINTH CIRCUIT OVERLOOKED THE FIRM PRESUMPTION THAT COURTS MAY ENJOIN CONSTITUTIONAL VIOLATIONS, AND UNDERMINED A KEY FOUNDATION OF COLLECTIVE BARGAINING.....15

A. Absent a Clear Statement to The Contrary, the CSRA Preserves Judicial Review of Constitutional Claims..... 16

B. The Ninth Circuit Confused the Narrow Grounds for Inferring a Monetary Remedy with the Broad Grounds for Inferring an Equitable Remedy. 18

C. The Presumption of Judicial Review, Jettisoned by the Ninth Circuit, Facilitates the Collective-Bargaining Process. 22

III. THE NINTH CIRCUIT'S DECISION IGNORED THE CSRA's TEXT, PURPOSE, AND STRUCTURE. 23

A. The Plain Text Of The CSRA Amendment Does Not Preclude Judicial Review. 23

B. The CSRA's Legislative History Reinforces Congress's Intent to Preserve Judicial Review. 24

CONCLUSION 26

TABLE OF AUTHORITIES

FEDERAL CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 9

Adler v. Glickman, 87 F.3d 956 (7th Cir. 1996) 10

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ... 10

Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995) 23

Board of Education v. Earls, 536 U.S. 822 (2002) 8

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) 21

Bell v. Hood, 327 U.S. 678 (1946) 20

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics 403 U.S. 388 (1971) 18

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 16

Bush v. Lucas, 462 U.S. 367 (1983) 18, 19, 20, 22

Califano v. Sanders, 430 U.S. 99 (1977) 8

Carlson v. Green, 446 U.S. 14 (1980) 18, 20

Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990) 3, 24, 25, 26

Chappell v. Wallace, 462 U.S. 296 (1983) 13, 14

Chicago & Northwestern Railway Co. v. United Transport Union, 402 U.S. 570 (1971) 24, 25

City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005) 23

Cohen v. de la Cruz, 523 U.S. 213 (1998) 23

Connick v. Myers, 461 U.S. 138 (1983) 8, 13

Cooper Industries, Inc. v. Aviall Services, Inc., 125 S. Ct. 577 (2004) 23

Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001) 19, 20, 21, 22

Cutter v. Wilkinson, 125 S. Ct. 2113 (2005) 8

Davis v. Passman, 442 U.S. 228 (1979) 16, 18

Demore v. Kim, 538 U.S. 510 (2003) 17

FDIC v. Meyer, 510 U.S. 417 (1994) 20

Goldman v. Weinberger, 475 U.S. 503 (1986) 13, 14

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) 15, 22

Heckler v. Ringer, 466 U.S. 602 (1984) 14

Hubbard v. EPA, 809 F.2d 1 (D.C. Cir. 1986) 19

Johnson v. Robison, 415 U.S. 361 (1974) 17

Lane v. Pena, 518 U.S. 187 (1996) 21

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 9

McDonald v. City of West Branch, 466 U.S. 284 (1984) 11

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 9

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 24

Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995) 19

Mudge v. United States, 308 F.3d 1220 (Fed. Cir. 2002).. 26

NTEU v. Chertoff, -- F. Supp. 2d.--, 2005 WL 1941398 (D.D.C. Aug. 12, 2005) 12

NTEU v. Von Raab, 489 U.S. 656 (1989) 2, 13

O'Connell v. Hove, 22 F.3d 463 (2d Cir. 1994) 3

Pacific Gas & Electric Co. v. State Energy Conservation & Development Commission, 461 U.S. 190 (1983) 9

Pickering v. Board of Education, 391 U.S. 563 (1968) 13

Reno v. Catholic Social Services, Inc.,, 509 U.S. 43 (1993) 16

Saul v. United States, 928 F.2d 829 (9th Cir. 1991)..... 19

Schweiker v. Chilicky, 487 U.S. 412 (1988)..... 2, 20

Shalala v. Illinois Council on Long Term Care, 529 U.S. 1 (2000) 14

Smith v. Doe, 538 U.S. 84 (2003) 8

Snepp v. United States, 444 U.S. 507 (1980) 15

Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) 19

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 12

Steadman v. Governor, United States Soldiers' and Airmen's Home, 918 F.2d 963 (D.C. Cir. 1990) 14

Tenet v. Doe, 125 S. Ct. 1230 (2005) 15

Traynor v. Turnage, 485 U.S. 535 (1988) 15

Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982) 5

United States v. Enmons, 410 U.S. 396 (1973) 25

United States v. Fausto, 484 U.S. 439 (1988) 26

United States v. Stanley, 483 U.S. 669 (1987) 14

Veit v. Heckler, 746 F.2d 508 (9th Cir. 1984) 3

Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988) 9, 10

Wallace v. Jaffree, 472 U.S. 38 (1985) 24

Webster v. Doe, 486 U.S. 592 (1988) 15, 17

Weinberger v. Salfi, 422 U.S. 749 (1975) 14

FEDERAL STATUTES

5 C.F.R. 2423.41 5

5 U.S.C.:

§ 1101 *et seq* 1

§ 1211 5

§ 1214(b)(1) 6

§ 2301(b)(2) 6

§ 2302(b) 5

§ 2302(b)(8) 6

§ 2302(b)(12) 5

§ 702 ..... 16, 21

§7116 5

§7116(a) 5

§ 7118 5

§ 7121(a)(1) 4, 23, 24, 25

§ 7123(a) 5

§ 7701 ..... 23, 24

§ 7703 ..... 4, 23, 24

§ 7703(a)(1) 22

§ 7703(b)(1) 22

28 U.S.C. § 1331 16

49 U.S.C.:

§ 40122(g)(2) 6, 11

§ 40122(g)(3) 4, 10, 21

§ 40122(j) 4, 21

§ 40122(h) 4, 10

§ 45102(a)(1) 2

§ 45104(8) 2

H.R. Rep. No. 103-599, pt. 1 (1994) 25

Pub. L. No. 95-454, Title VII, § 701, 92 Stat. 111 (1978) .. 3

Pub. L. No. 103-424, 108 Stat. 4365 (1994) 4

LEGISLATIVE HISTORY

To Reauthorize the Office of Special Counsel and to Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 before the Subcomm. on the Civil Serv. of the House Comm. on Post Office and Civil Serv., 103d Cong. (1993) 11, 24

MISCELLANEOUS

Black's Law Dictionary (6th ed. 1990) 23

Center for Organizational Research, *The Aging-and-Retiring Government Workforce* 2 (2003) 2

Center for Organizational Research, *The Class of 9/11* (2005) 2

Christopher Lee, *Unions Seek to Meet Chertoff on DHS Plan*, Wash. Post., Aug. 16, 2005, at A11 12

Partnership for Public Service, *The Class of 9/11* (2005) ... 2

STATEMENT OF INTEREST[1]

The American Federation of Government Employees ("AFGE"), an affiliate of the AFL-CIO, is a labor union that represents approximately 600,000 civilian employees of nearly every major department and agency of the federal government, as well as the government of the District of Columbia.

The National Federation of Federal Employees ("NFFE"), an affiliate of the International Association of Machinists and Aerospace Workers, is a labor union that represents approximately 65,000 civilian employees of major departments and agencies of the federal government, including the General Services Administration; Veterans Administration; and Departments of Agriculture, Interior, Defense, and Homeland Security.

Amici were heavily involved in the original enactment and subsequent amendment of the Civil Service Reform Act ("CSRA"), 5 U.S.C. § 1101 *et seq.*, and thus have an institutional interest in decisions interpreting the CSRA. Amici believe that CSRA-covered federal employees deserve the same, basic protection available to private citizens: the right to seek equitable redress in federal court for violations of their federal constitutional and statutory rights.

In addition, as emerging civil service reforms reduce the administrative and judicial remedies available to many federal public servants, Amici's members depend on judicial

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[1] Letters from Petitioner and Respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, Amici state that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than Amici, make a monetary contribution to the preparation or submission of this brief.

review as a last resort to protect their basic constitutional rights.

Finally, Amici recognize that the nation continues to depend on federal civil servants to deliver essential services and safeguard homeland security. As large percentages of civil servants approach retirement, the government will "increasingly engage in a 'war for talent' with both businesses and nonprofits." Partnership for Public Service, *The Class of 9/11* 7 (2005).[2] Restricting civil servants' ability to vindicate their constitutional rights in court "would undoubtedly lead to new difficulties and expense in recruiting [qualified civil servants] for the programs Congress has established." *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988).

STATEMENT OF THE CASE

Petitioner Terry L. Whitman has worked for twenty years as an Air Traffic Assistant with the Federal Aviation Administration ("FAA"). (Pet. App. 2a.) Congress has authorized the FAA to subject certain employees to "reasonable suspicion, random, and post-accident" testing for drugs and alcohol. 49 U.S.C. § 45102(a)(1). The FAA must "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." 49 U.S.C. § 45104(8). The drug tests must also comply with the Fourth Amendment. *NTEU v. Von Raab*, 489 U.S. 656, 665 (1989).

[2] *See also* Center for Organizational Research, *The Aging-and-Retiring Governmen: Workforce* 2 (2003).

Whitman recognizes the FAA's authority to conduct drug tests, but seeks to enjoin the FAA from administering its drug testing program in a nonrandom and suspicionless manner. (J.A. 6-7.) Whitman has been drug tested eleven times, and significantly more frequently than his colleagues, despite never having tested positive. (J.A. 6-11, 13-19.) Whitman also contends that the FAA has subjected him to additional tests as retaliation against him for complaining about the FAA's misapplication of the testing program. (J.A. 13, 14-19.)

Whitman initially filed a complaint with the Federal Labor Relations Authority ("FLRA"). (Pet. App. 3a.) The FLRA determined that it lacked jurisdiction over his complaint, and subsequently denied Whitman's request for reconsideration. (*Id.*) The FLRA also told Whitman that his "recourse is through the grievance procedures of the negotiated agreement." (*Id.*)

Whitman's grievance procedures are provided by the collective bargaining agreement ("CBA") negotiated between the FAA and Whitman's union. (J.A. 20-28.) Prior to 1994, the CSRA described the CBA's negotiated grievance procedures as "the exclusive procedures for resolving grievances." *See* Pub. L. No. 95-454, Title VII, § 701, 92 Stat. 1111 (1978). Some courts, including the Federal Circuit, interpreted this language to prohibit judicial review of such grievances, even after the employee had exhausted his CBA procedures. *See, e.g., Carter v. Gibbs*, 909 F.2d 1452, 1457-58 (Fed. Cir. 1990) (en banc).[3]

In 1994, Congress amended the CSRA to provide that CBA grievance procedures are "the exclusive *administrative*

[3] *See also, e.g., O'Connell v. Hove*, 22 F.3d 463, 466 (2d Cir. 1994); *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984).

procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1), Pub. L. No. 103-424, § 9, 108 Stat. 4365 (1994) (emphasis added).

After the FLRA dismissed his complaint, Whitman filed suit in federal district court. Whitman alleged that the FAA's targeted, suspicionless testing violated both the drug testing statute and the Constitution. (*See* J.A. 6-19.) The district court dismissed Whitman's complaint for lack of subject matter jurisdiction. (Pet. App. 14a.) The Ninth Circuit affirmed, holding that the CSRA "as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements." (Pet. App. 2a.)

The Ninth Circuit's decision leaves Whitman with no opportunity for judicial review of his statutory or constitutional claims. In addition to the CBA grievance procedures, FAA employees have available the following administrative options, none of which lead to judicial review:

Merit Systems Protection Board: An employee who has suffered a "major adverse personnel action" can seek review from the Merit Systems Protection Board ("MSPB"). *See* 49 U.S.C. §§ 40122(g)(3), (h). A "'major adverse personnel action' means a suspension of more than 14 days, a reduction in pay or grade, a removal for conduct or performance, a nondisciplinary removal, a furlough of 30 days or less ...,or a reduction in force action." *Id.* § 40122(j). Parties dissatisfied with the MPSB's resolution may appeal to the Federal Circuit. *See* 5 U.S.C. § 7703.

Whitman has not suffered a "major adverse personnel action," and therefore cannot invoke the MSPB's jurisdiction. Were Whitman not covered by the CBA, he would be eligible to petition the Guaranteed Fair Treatment

Program ("GFTB"), an FAA-specific arbitration procedure which culminates in judicial review. Like the MSPB, however, the GFTB is limited to employees who have suffered a "major adverse personnel action." *See* 49 U.S.C. § 40122(h).

Federal Labor Relations Authority: The FLRA hears employee claims of "unfair labor practices" against either the agency employer, or employee's union. *See* 5 U.S.C § 7116(a). Unfair labor practices generally involve violations of employees' rights with respect to labor organizing, union representation, and collective bargaining, as provided by the Federal Service Labor Management Relations Statute. *See* 5 U.S.C. §7116. An employee challenging an "unfair labor practice" initiates the process by lodging a charge with an FLRA regional office. If the office decides to issue a complaint, an administrative law judge will hear the complaint and issue a final administrative order. *See* 5 U.S.C. § 7118; 5 C.F.R. 2423.41. The employee may seek judicial review of that order. *See* 5 U.S.C. § 7123(a).

Whitman's FLRA regional office found that it lacked jurisdiction over Whitman's claims, and thus declined to issue a complaint. (Pet. App. 3a.) An employee may not seek judicial review of a regional office's refusal to issue a complaint. *See, e.g., Turgeon v. FLRA*, 677 F.2d 937, 939 (D.C. Cir. 1982) (per curium).

Office of Special Counsel: An employee subject to a "prohibited personnel practice" may petition the Office of Special Counsel ("OSC"). *See* 5 U.S.C. § 1211. The OSC reviews complaints regarding violations of twelve prohibited personnel practices delineated in 5 U.S.C. § 2302(b). Among the twelve prohibited practices is the violation of "any law, rule, or regulation implementing, or directly concerning, the [statutory] merit system principles." *Id.* § 2302(b)(12). The "merit system principles" require agencies to treat their

employees "with proper regard for their privacy and constitutional rights." *Id.* § 2301(b)(2).

However, under the FAA Personnel Management System, only employees asserting whistleblower claims, as defined by 5 U.S.C. § 2302(b)(8), can petition the OSC. *See* 49 U.S.C. § 40122(g)(2)(A). Whitman is not and does not purport to be a whistleblower. Even if Whitman were subject to the omnibus CSRA procedures, his claims would not be subject to judicial review. Non-whistleblower claims can be brought to the MSPB and eventually to the Federal Circuit *only* if the OSC first finds "reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." *See* 5 U.S.C. § 1214(b)(1). If the OSC does not find such "reasonable grounds," the employee receives no additional administrative or judicial review.

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As a result of the Ninth Circuit's decision, then, Whitman could not receive judicial review of even his constitutional claims unless he refused to submit to a drug test and suffered a termination or other "major adverse employment action."

SUMMARY OF ARGUMENT

The Court has traditionally interpreted federal civil service statutes to provide Government agencies with necessary flexibility, while also ensuring that the federal courts are open as a last resort for civil servants seeking to enjoin unconstitutional employment actions. The Ninth Circuit's decision upsets Congress's careful balance by holding that CSRA, as amended, affords civil servants no judicial review, even for constitutionally-based claims seeking equitable relief. The Court has never imputed such a

radical departure from the settled presumption of constitutional review.

For decades Congress has legislated under the presumption that federal judicial review is available to provide equitable relief to those aggrieved by agency action, especially unconstitutional agency action. Nothing in the amended CSRA's text, structure, or legislative history suggests that Congress sought either to overcome this strong presumption, or to single out federal employees as a class of people without access to judicial redress. To the contrary, the 1994 amendments to the CSRA illustrate that when courts have interpreted the CSRA to foreclose judicial review, Congress has responded swiftly to remedy this unfair result.

The Ninth Circuit's nullification of Congress's intent to restore judicial review to public servants' constitutional and statutory claims has disturbing implications. Recent and proposed legislation will, for an increasing number of civil servants, eliminate the CSRA's remedial protections. For these employees, the availability of judicial review of independent constitutional and statutory rights is more vital than ever.

ARGUMENT

I. THE NINTH CIRCUIT UPSET A DELICATE BALANCE BETWEEN GOVERNMENT EMPLOYERS' FLEXIBILITY AND THE CONSTITUTIONAL AND STATUTORY RIGHTS OF PUBLIC SERVANTS.

Rather than recognizing the historic balance between the interests of Government agencies and those of their employees, the Ninth Circuit's reading of the CSRA shifts the pendulum far in one direction. The Ninth Circuit's

construction of the CSRA would leave courts powerless to enjoin even the most flagrant violations of federal civil servants' constitutional rights that fall short of major adverse actions. Under this interpretation, state prisoners, high school students, and convicted sex offenders would potentially have more access to judicial relief than would federal public servants.[4] In sum, the decision below would resurrect the long-discredited "dogma . . . that a public employee ha[s] no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983).

A. The Ninth Circuit's Decision Leaves Many Federal Employees Without an Effective Remedy For Unconstitutional Government Conduct.

"Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is *essential* to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (emphasis added). Yet the Ninth Circuit's reading of the CSRA assumes that Congress intended to strip federal civil servants of this "essential" protection, leaving them without even the most basic protection of their constitutional rights.

1. The CSRA's administrative remedies are no substitute for judicial review.

[4] *See, e.g., Cutter v. Wilkinson*, 125 S.Ct. 2113, 2116 (2005) (permitting prisoners to challenge restrictions on religious practice); *Smith v. Doe*, 538 U.S. 84, 89 (2003) (considering and rejecting challenge by convicted sex offender seeking to enjoin requirement that he register with the state); *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002) (considering and rejecting high school student's Fourth Amendment challenge to administration of drug tests).

The Ninth Circuit's decision leaves CSRA-covered employees without meaningful protections against certain conduct that is illegal or even unconstitutional. *First*, the Ninth Circuit decision invites employees such as Whitman to forfeit the opportunity to bring a pre-enforcement challenge to illegal restrictions. If an agency supervisor reprimanded any employee who prayed at a given mosque, church, or synagogue, who joined a particular organization, or who voted for a particular political candidate, that employee would not suffer the "major adverse personnel action" necessary for judicial review until after she engaged in the constitutionally protected conduct and was terminated. Few employees would be willing or able to jeopardize employment for an opportunity to assert their constitutional rights in court. Conditioning judicial review on losing one's job, or other serious consequences, would be "tantamount to a complete denial of judicial review." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991) (recognizing that absent availability of pre-enforcement challenge to constitutionality of INS administration of agricultural worker program, aliens seeking to contest INS practice could ensure judicial review "only if they voluntarily surrender themselves for deportation").

The Court has repeatedly recognized that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pac. Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n*, 461 U.S. 190, 200 (1983) (quotations omitted).[5] Thus, in *Virginia v. American*

[5] *See also, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (when an agency promulgates "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately[,] [s]uch agency action is 'ripe' for review at once"); *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967) (pre-enforcement challenge appropriate "where a regulation requires an immediate and significant

Booksellers Ass'n, 484 U.S. 383 (1988), the Court permitted a pre-enforcement First Amendment challenge to a Virginia law restricting the displays of booksellers. The Court held that "the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without actual prosecution." *Id.* at 393.

Second, the Ninth Circuit's ruling will in many cases wrest judicial review from even those civil servants courageous enough to exercise their constitutional rights. A federal employee can obtain judicial review from the Federal Circuit of "major adverse personnel actions," which are limited to suspension of greater than two weeks; a pay cut or demotion; a furlough of 30 days or less; or termination. *See* 49 U.S.C. 40122(g)(3), (h). But a civil servant who receives "reprimand letters, . . . [a] two-week suspension without pay, denial of training and advancement opportunities, and negative evaluations," *see, e.g., Adler v. Glickman*, 87 F.3d 956, 958 (7th Cir. 1996), may not seek equitable relief from a federal court—even if the punishment was motivated by blatantly unconstitutional considerations.

Without judicial review, most civil servants would have only two means of enforcing their constitutional rights. Both are inadequate. An employee could ask his union to pursue arbitration on his behalf. But the Court has never held that binding arbitration is an appropriate way to dispose of an employee's constitutional claims. In other contexts, the Court has signaled that the adjudication of "constitutional issues is a primary responsibility of the courts." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

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change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance").

In any event, the union can refuse to pursue arbitration, and an employee cannot appeal the union's decision. Even if the union were to pursue the employee's claim, "[t]he union's interests and those of the individual employee are not always identical or even compatible," *McDonald v. City of West Branch*, 466 U.S. 284, 291 (1984). The union may be constrained by limited resources, or the need to consider the interests of its entire membership. As a result, "the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee." *Id.* Without judicial review, "an employee's opportunity to [redress] a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *Id.*

Alternatively, the employee could pursue administrative remedies by filing a complaint with the Office of Special Counsel. FAA employees such as Whitman, however, can only do so if their claim involves whistleblowing. *See* 49 U.S.C. § 40122(g)(2)(A).

Even for employees covered by the more expansive CSRA provision, the OSC remedy is insufficient on its own. As AFGE officials have testified before Congress, the OSC "has remained a source of great frustration and little refuge for federal workers complaining of prohibited personnel practices," and "has failed to act in a timely and effective manner in too many of the situations brought before it, to the detriment of those the office is charged with helping."[6] As Justice Brandeis recognized nearly 70 years ago,

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[6] *See To Reauthorize the Office of Special and to Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv.*, 103d Cong. 17-19 (1993).

> [t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous law was applied . . . the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

2. Non-CSRA employees may lack any forum, judicial or administrative, to redress violations of statutory or constitutional rights.

The Ninth Circuit's decision will particularly destabilize the rights of those federal employees who lack even the administrative remedies provided by the CSRA. Upon establishing the Department of Homeland Security, "Congress gave [the Department] extraordinary authority to develop a separate human resources management system [] for DHS without regard to many of the constraints imposed by the civil service laws that normally govern employees in the competitive service of the federal government." *Nat'l Treasury Employees Union v. Chertoff*, --- F. Supp. 2d. ---, 2005 WL 1941398, at *1 (D.D.C. Aug. 12, 2005). Homeland Security's new personnel system "is expected to dramatically change the way many of the department's 180,000 workers are paid, promoted, deployed, and disciplined. A similar system being developed at the Defense Department would affect 746,000 workers . . . ." Christopher Lee, *Unions Seek to Meet Chertoff on DHS Plan*, Wash. Post., Aug. 16, 2005, at A11.

Given the abolition of many checks on the Government's treatment of federal employees, judicial

review is becoming even more essential to preventing the federal workplace from devolving into a "rights-free" zone.

B. Unlike the Ninth Circuit's Decision, the Court's Precedents Preserve Agency-Employers' Flexibility While Still Enforcing Civil Servants' Constitutional Rights.

The Court has traditionally recognized the need to balance the protection of civil servants' constitutional rights with "the interest of the [Government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). But the Court has struck such a balance without denying public servants, including federal public servants, the right to vindicate in court their fundamental constitutional rights.

The Court strikes this balance in several ways. *First*, the Court recognizes that although government employees do not forfeit their constitutional rights in the workplace, Government interests may affect the scope of a civil servant's constitutional rights. Thus, in *Connick*, the Court held that government employees may be disciplined based on speech unrelated to matters of public concern, but reiterated that the First Amendment protects such employees' workplace speech about issues of public concern. 461 U.S. at 147. Likewise, in *Von Raab*, the Court upheld the Government's right to administer drug tests to employees responsible for interdicting illegal drugs, but reaffirmed the general principle that the Fourth Amendment constrains the Government's searches of its employees. 489 U.S. at 672.

Even "the unique disciplinary structure of the military establishment," *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), which mandates judicial review "far more deferential than constitutional review of similar laws or regulations

designed for civilian society," *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), does not bar military personnel "from all redress in civilian courts for constitutional wrongs suffered in the course of military service," *Wallace*, 462 U.S. at 304. Rather, military personnel may seek equitable relief "designed to halt or prevent the constitutional violation." *United States v. Stanley*, 483 U.S. 669, 683 (1987).

Second, the Court has recognized Congress's ability to require the channeling of legal claims through administrative processes prior to judicial review. Such channeling through an agency process "assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts." *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 13 (2000).[7]

But the courts have also concluded that Congress intended such administrative avenues to complement, not supplant, judicial review. In *Steadman v. Governor, United States Soldiers' and Airmen's Home*, 918 F.2d 963 (D.C. Cir. 1990), the District of Columbia Circuit recognized that by enacting the CSRA "Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector," which "federal employees may not circumvent . . . even if their claim is based as well on the Constitution." *Id.* at 967. At the same time, the court stressed that if the administrative process fails to vindicate a federal employee's constitutional rights, "the federal courts are open." *Id.* at 968.

Third, although the Court acknowledges that civil litigation must sometimes adapt to the unique functions of certain government agencies, the Court has nonetheless

[7] *See also, e.g., Heckler v. Ringer*, 466 U.S. 602 (1984); *Weinberger v. Salfi*, 422 U.S. 749 (1975).

concluded that Congress did not intend to exempt even the most top-secret of federal agencies from answering to judicial process. For example, the Court has prohibited former covert agents from bringing constitutional claims against the CIA where the suit would require disclosure of "the existence of [the plaintiffs'] secret espionage relationship with the Government." *Tenet v. Doe*, 125 S. Ct. 1230, 1236 (2005).

But, the Court has refused to hold that "all [CIA] employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute direction of the Director." *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Court determined that Congress preserved CIA employees' opportunity for court-ordered constitutional redress even though the CIA "is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world." *Snepp v. United States*, 444 U.S. 507, 512 n.7 (1980).

II. THE NINTH CIRCUIT OVERLOOKED THE FIRM PRESUMPTION THAT COURTS MAY ENJOIN CONSTITUTIONAL VIOLATIONS, AND UNDERMINED A KEY FOUNDATION OF COLLECTIVE BARGAINING.

The Court maintains "the strong presumption that Congress intends judicial review." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (citation omitted). As a result of this presumption, the Court requires "clear and convincing evidence of any congressional intent to preclude" judicial review of agency action. *Traynor v. Turnage*, 485 U.S. 535, 543 (1988). The presumption in favor of judicial review is even stronger when constitutional claims are at stake, given the "serious constitutional question" that would arise if a statute withheld any and all judicial review of

constitutional claims. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986).

The Ninth Circuit neither mentioned nor applied these principals in holding that the CSRA precludes equitable judicial relief for continuing violations of an individual's constitutional rights. Instead, the Ninth Circuit incorrectly applied the Court's *Bivens* line of cases, which establish a standard for judicial creation of constitutional damages remedies, but presuppose access to equitable relief. Further, the Ninth Circuit's novel approach upset not only decades of Supreme Court precedent, but also a key assumption underlying collective bargaining between civil servants and the Government.

A. Absent a Clear Statement to The Contrary, the CSRA Preserves Judicial Review of Constitutional Claims.

The Ninth Circuit held that the CSRA "does not constitute an express grant of federal court jurisdiction over [statutory and constitutional] claims." (Pet. App. 10a.) The grant need not come from the CSRA. 28 U.S.C. § 1331 provides federal courts subject matter jurisdiction to review agency action. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993). Plaintiffs implicitly possess a cause of action to enforce their own constitutional rights. *Davis v. Passman*, 442 U.S. 228, 242-44 (1979). And the Administrative Procedure Act waives sovereign immunity for suits seeking equitable relief against an agency or its officials. 5 U.S.C. § 702.

Nor did the CSRA strip the courts of their preexisting authority to enjoin the Government from violating a citizen's constitutional rights. Time and time again, the Court has refused to interpret federal statutes to prohibit courts from enjoining unconstitutional agency action, even when

presented with court-stripping language far clearer than it is here. The necessary clear statement was missing from language providing that "the decisions of the Administrator on *any* question of law or fact under any law administered by the Veterans Administration providing benefits . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision." *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (emphasis added). Also insufficiently clear was a statutory command that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien." *Demore v. Kim*, 538 U.S. 510, 516 (2003).

Even when the rights of federal employees are at stake, and even in the most sensitive and secretive of agencies, the Court has interpreted the statute at issue to preserve judicial review of constitutional claims. In *Webster*, a terminated CIA employee contended that his firing violated due process and equal protection, and sought an injunction reinstating him. 486 U.S. at 601-02. The National Security Act provided that the CIA Director "may, in his discretion, terminate the employment of any [Agency employee] whenever he shall deem such termination necessary." *Id.* at 594. The Court agreed, given the Act's language and the sensitive nature of the CIA's mission, that the APA prohibited judicial review of the Director's decision. *Id.* at 601.

Nevertheless, the Court refused to interpret the Act as depriving the employee of the right to seek judicial review of his constitutional claims. Notwithstanding that the Act manifested intent to preclude judicial review of personnel decisions, the Court reiterated that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Id.* at 603. The Court reaffirmed that it "require[s] this heightened showing in part to avoid the

serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* (citation omitted).

The Court has *never* interpreted a statute to prohibit *all* judicial review of a constitutional claim brought against a federal agency. Without a clear statement precluding such review, the CSRA is a poor candidate to be the first.

B. The Ninth Circuit Confused the Narrow Grounds for Inferring a Monetary Remedy with the Broad Grounds for Inferring an Equitable Remedy.

The Ninth Circuit's decision stems from a fundamental misapplication of the Court's *Bivens* jurisprudence. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court held that even absent specific congressional authorization, a plaintiff could sue federal narcotics agents for monetary damages resulting from a search and seizure that violated the Fourth Amendment. 403 U.S. 388, 397 (1971).[8] However, in *Bush v. Lucas*, 462 U.S. 367 (1983), the Court refused to infer a *Bivens* remedy for constitutional violations affecting federal employees covered by the CSRA. The Court held that the CSRA's "elaborate, comprehensive [administrative] scheme" counseled against creating "a new judicial remedy" that would allow a civil servant to seek monetary damages from a federal official who had allegedly violated his First Amendment rights. *Id.* at 385, 388.

[8] The Court has subsequently extended *Bivens* damages relief to actions for violations of both the Fifth Amendment Due Process Clause, *see Davis v. Passman*, 442 U.S. 228 (1979), and the Eighth Amendment's prohibition against cruel and unusual punishment, *see Carlson v. Green*, 446 U.S. 14 (1980).

The Ninth Circuit's decision is based upon a prior Ninth Circuit holding that under *Bush* and its progeny, "[t]he CSRA [also] precludes [a plaintiff] from seeking injunctive relief for his asserted constitutional injury...." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). But *Bush*, like the entire *Bivens* line of cases, did not purport to create or restrict equitable relief. Rather, the Court asked "[w]hen a federal civil servant is the victim of a retaliatory demotion or discharge because he has exercised his First Amendment rights, what *legal* remedies are available to him?" *Bush*, 462 U.S. at 381 (emphasis added).

As other Courts of Appeals recognize, the Ninth Circuit's extension of *Bivens* analysis to suits seeking wholly injunctive relief is unsupported by the logic of *Bivens* itself. *Hubbard v. EPA*, 809 F.2d 1, 11 (D.C. Cir. 1986) (stating that "*Bush* only precludes damage claims against individuals, not equitable claims against agencies"); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) ("Just because 'special factors counseling hesitation' militate against the creation of a new non-statutory damages remedy, it does not necessarily follow that the long-recognized availability of injunctive relief should be restricted as well."); *Spagnola v. Mathis*, 859 F.2d 223, 226 (D.C. Cir. 1988) (noting that the Court's decision in *Bush* held that the CSRA's comprehensive statutory scheme constitutes a "special factor counseling hesitation against *creating* a [new] *Bivens* remedy") (emphasis added and internal citation omitted).

First, unlike in the *Bivens* context, the Court need not break new ground to recognize the right to seek injunctive relief to remedy constitutional violations. *Bivens* "recognized for the first time" an implied cause of action for money damages to remedy a constitutional violation. *Corr.*

Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001).[9] Decisions such as *Bush* limiting *Bivens* remedies reflect the Court's unwillingness to adopt "suggestions that *Bivens* remedies be *extended into new contexts*." *Schweiker*, 487 U.S. at 421 (emphasis added). By contrast, even twenty-five years before *Bivens* was decided, it had long been "established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted).

Second, the Court's concerns about financial liability in the damages context are inapposite to actions for injunctive relief. The *Bivens* remedy contemplated both compensatory and punitive damages, *see Carlson v. Green*, 446 U.S. 14, 21-22 (1980), which could "creat[e] a potentially enormous financial burden for the Federal Government," *FDIC v. Meyer*, 510 U.S. 417, 486 (1994). In the CSRA context, the Court cautioned that "if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases." *Bush*, 462 U.S. at 389. Moreover, equitable relief imposes no personal financial liability on agency officials. It simply requires them to stop violating the Constitution.

[9] *See also Malesko*, 534 U.S. at 66 (discussing the Court's "authority to imply a *new* constitutional tort") (emphasis added); *Schweiker*, 487 U.S. at 422 (discussing previous question whether "to *create* a *Bivens* action for enlisted military personnel") (emphasis added); *Bush*, 462 U.S. at 389 (discussing "the impact of a *new species* of litigation between federal employees") (emphasis added); *Carlson*, 446 U.S. at 18 ("*Bivens established* that the victims of a constitutional violation by a federal agent have a right to recover damages.") (emphasis added).

Third, Congress itself views suits for monetary damages as far more intrusive than suits for injunctive relief. In *Lane v. Pena*, 518 U.S. 187, 192-93 (1996), the Court held that Congress had not waived the Government's sovereign immunity from a money damages suit brought by a cadet who was illegally expelled from the Merchant Marine Academy. Nevertheless, because Congress had not precluded the plaintiff from seeking injunctive relief, the Court upheld a lower court judgment ordering the cadet reinstated. Likewise, the APA waives the Government's sovereign immunity against suits in federal court, but does so only for suits "seeking relief other than money damages." 5 U.S.C. § 702.[10]

Finally, the Court has generally refused to infer *Bivens* damages remedies only when injunctive relief remains available. "[U]nlike the *Bivens* remedy, which [the Court has] never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Malesko*, 534 U.S. at 74. Thus, in *Malesko*, the Court noted that the plaintiff inmates had "full access to remedial mechanisms . . . including suits in federal court for injunctive relief." *Id.*

Indeed, the federal employee denied a *Bivens* remedy by *Bush* would have been able to seek equitable relief from the courts. The *Bush* plaintiff was challenging his demotion, *see* 462 U.S. at 370, and thus had recourse to the MSPB, *see* 49 U.S.C. § 40122(g)(3), (j), and the right to judicial review in

[10] *Cf. Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) ("[T]hat Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. . . . [The ADA's] standards can be enforced by . . . private individuals in actions for injunctive relief. . . .").

the Federal Circuit, *see* 5 U.S.C. § 7703(a)(1), (b)(1). In describing the available procedures, the Court explained that "[i]f the employee prevailed in the administrative process or upon judicial review, he was entitled to reinstatement with retroactive seniority." *Bush*, 462 U.S. at 388. Thus, the "existing civil service remedies," which the Court found "constitutionally adequate" to vindicate the plaintiff's constitutional rights, specifically included "procedures—administrative and judicial—by which improper action may be redressed." *Id.* at 378 n. 14, 385.

C. The Presumption of Judicial Review, Jettisoned by the Ninth Circuit, Facilitates the Collective-Bargaining Process.

Congress "legislate[s] against a backdrop of judicial review" for equitable constitutional claims, *see Gutierrez de Martinez*, 515 U.S. at 425, and the Court restricts monetary remedies under the assumption that equitable relief remains available, *see Malesko*, 534 U.S. at 74. The careful balance struck by the CBA itself depends on the long-established assumption that judicial review remains available for equitable constitutional claims. So long as access to the courts remains available at the back end to enjoin violations of fundamental constitutional rights, employee unions can grant agencies needed flexibility at the front end, while remaining confident that particularly egregious abuses will be checked. If back end review of even constitutional claims is abolished, however, employee unions will have no choice but to demand greater specificity upfront. Agencies would risk losing—not gaining—the flexibility they desire.

III. THE NINTH CIRCUIT'S DECISION IGNORED THE CSRA's TEXT, PURPOSE, AND STRUCTURE.

Far from providing the "clear statement" stripping the courts of the ability to enjoin unconstitutional agency conduct, the CSRA does the opposite. The text and legislative history of the 1994 amendments to 5 U.S.C. § 7121(a)(1) make clear that the CSRA's exclusivity requirement applies only to administrative procedures.

A. The Plain Text Of The CSRA Amendment Does Not Preclude Judicial Review.

The Ninth Circuit's decision holding that § 7121(a) precludes judicial review flouts several canons of construction. First, the Court "construe[s] a statute to give each word some operative effect." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 584 (2004). Under the Ninth Circuit's interpretation, however, the word "administrative" has no effect.

Second, the Court gives "undefined [statutory terms]…their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Both the Court and leading legal dictionaries distinguish between judicial and administrative functions, and both did so at the time the word "administrative" was inserted. *See, e.g. City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005); *Black's Law Dictionary* 45 (6th ed. 1990) (defining an "administrative remedy" as "a *nonjudicial* remedy provided by an administrative agency") (emphasis added).

Third, the Court presumes that "equivalent words have equivalent meaning when repeated in the same statute." *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998). Congress in §§ 7701 and 7703 treats "administrative" review and

"judicial" review as distinct entities. *Compare* 5 U.S.C. § 7701 (providing for administrative review by the MSPB), *with id.* § 7703 (providing for judicial review of MSPB decisions). There is no reason to believe that Congress also intended "administrative" to mean "administrative and judicial," especially given that such a definition would diverge from the ordinary meaning of both terms.

B. The CSRA's Legislative History Reinforces Congress's Intent to Preserve Judicial Review.

The Court does "not lightly conclude that a congressional enactment has no purpose or function." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 560 (1963). As a result, the Court applies the "common-sense presumption" that Congress intends to change a law that it amends. *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985). The legislative history confirms that by inserting "administrative" into § 7121(a), Congress intended to abrogate court decisions holding that CSRA § 7121(a) precluded judicial review.

Testimony by National Treasury Employees Union officials proposed "a change to existing law, as interpreted by the Federal Circuit in *Carter v. Gibbs*, to ensure that the negotiated grievance procedure is the *exclusive administrative procedure*, but does not supplant any remedies which allow Federal employees to be heard directly in Federal court."[11] The Court has paid keen attention to the statements of interested parties, including labor unions, which played a key role in the given statute's enactment. *See, e.g., Chicago & Nw. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 576 (1971) (labor and management

[11] *To Reauthorize the Office of Special Counsel and to Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 Before the House Subcomm. on the Civil Serv. of the House Comm. on Post Office and Civil Serv.*, 103d Cong. 23 (1993) (emphasis added).

representatives receive "great weight in the construction of the [Federal Labor Railway Act]" due to the representatives' role in the Act's enactment).

A companion bill addressing the Federal Employee Fairness Act of 1994 ("FEFA"), which was debated simultaneously with the 1994 amendment to the CSRA, similarly inserted "administrative" into § 7121(a). The House Report for FEFA specifically stated that the proposed amendment

> clarifies Congress' original intent that the grievance procedure would be an exclusive administrative procedure for matters that it covers. The grievance procedure was never intended to deprive employees of access to the courts. This clarification is necessary to correct an erroneous decision of the U.S. Court of Appeals for the Federal Circuit. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990). *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811, 111 S. Ct. 46 (1990), which denied employees the right to judicial review of claims under the Fair Labor Standards Act.

H.R. Rep. No. 103-599, pt. 1, at 56 (1994). Though FEFA was never enacted, Congress considered the two pieces of legislation during the same legislative session. Therefore, FEFA's legislative history is "wholly relevant to an understanding of" a subsequently enacted bill with the same operative language. *United States v. Enmons*, 410 U.S. 396, 405 n.14 (1973).

Unlike the Ninth Circuit, the Federal Circuit scrutinized the CSRA's wording, structure, and history, and concluded that the 1994 amendments to the CSRA preserved judicial

review. *Mudge v. United States* 308 F.3d 1220 (Fed. Cir. 2002). The court rejected the argument that Congress inserted "administrative" into § 7121(a) in order to clarify the statute. In *Carter*, the Federal Circuit interpreted the "unambiguous" pre-1994 version of the statute to mean that the CBA grievance procedures provided the *only* procedures for resolving grievances falling within the statute's coverage. 909 F.2d at 1454. As *Mudge* explains, Congress had no need to clarify an unambiguous statute that had previously been interpreted to preclude judicial review. 308 F.3d at 1228. Instead, Congress's insertion of "administrative" indicates that § 7121(a) limits *only* an employee's administrative remedies, and not her judicial remedies. *See id.*

The Federal Circuit is the Article III court with exclusive jurisdiction to review employment-based money damage claims against the United States, and also reviews MSPB and OSC decisions arising from the CSRA's administrative procedures. Given "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review [under the CSRA]," *United States v. Fausto*, 484 U.S. 439, 449 (1988), *Mudge*'s analysis warrants the Court's attention, and the Ninth Circuit's erroneous interpretation should be rejected.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

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IN THE

Supreme Court of the United States

TERRY L. WHITMAN,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. SECTION 7121(a)(1), AS AMENDED, DOES NOT AFFECT THE RIGHT OF FEDERAL EMPLOYEES TO SEEK JUDICIAL REDRESS FOR VIOLATIONS OF THEIR CONSTITUTIONAL AND STATUTORY RIGHTS	7
A. The District Court Had Subject Matter Jurisdiction over Petitioner's Challenge to FAA's Drug-Testing Program Under 28 U.S.C. § 1331	7
B. The Ninth Circuit's Decision Requiring Petitioner To Establish that the CSRA *Conferred* Jurisdiction over His Claims on the Federal Courts Was Erroneous and Would Strip the Federal Courts of Jurisdiction over a Broad Variety of Legal Claims that They Have Traditionally Adjudicated	9
C. Congress Amended 5 U.S.C. § 7121(a) To Confirm that the Negotiated Grievance Procedure Is Exclusive only as to Other Administrative Remedies, and not as to Judicial Causes of Action	11

TABLE OF CONTENTS—Continued

Page

1. The plain language of the statute confirms that Congress was repudiating the Federal Circuit's decision in *Carter*, which held that negotiated procedures were exclusive as to judicial causes of action 11
2. The legislative history of the 1994 amendment supports the plain meaning of its text 16
3. The policy arguments of the government are without merit..... 20

II. THE CSRA DOES NOT IMPLICITLY PRECLUDE PETITIONER FROM PURSUING EQUITABLE RELIEF DIRECTLY IN FEDERAL COURT TO CHALLENGE VIOLATIONS OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS ARISING OUT OF FAA'S DRUG-TESTING PROGRAM 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — Page

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 9
AFGE v. Martin, 969 F.2d 788 (9th Cir. 1992)..... 8
AFGE v. Roberts, 9 F.3d 1464 (9th Cir. 1993)..... 8
Air Line Pilots Ass'n v. Northwest Airlines, 199 F.3d 477 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc)..... 22
Amell v. United States, 384 U.S. 158 (1966)..... 10
Artuz v. Bennett, 531 U.S. 4 (2000)..... 20
ASEDAC v. Panama Canal Comm'n, 329 F.3d 1235 (11th Cir. 2003) 4, 15
Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) 14, 22
Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984)..... 9
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 11
Bosco v. United States, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g)..... 2, 26
Bowen v. Mich. Acad. of Physicians, 476 U.S. 667 (1986)..... 9, 10
Bowsher v. Synar, 478 U.S. 714 (1986) 3
Brune v. Internal Revenue Serv., 861 F.2d 1284 (D.C. Cir. 1988)..... 3
Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983)..... 12
Bush v. Lucas, 462 U.S. 367 (1983)..... 28
Carter v. Gibbs, 690 F. Supp. 897 (C.D. Cal. 1988)..... 13
Carter v. Gibbs, 883 F.2d 1563 (Fed. Cir. 1989).. 13
Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir.) (*en banc*), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990)..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984)	11
Cornelius v. Nutt, 472 U.S. 648 (1985)	25
Fort Stewart Sch. v. FLRA, 495 U.S. 641 (1990)	28
Garcia v. United States, 469 U.S. 70 (1984)	16
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	22
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999)	11
Karahalios v. NFFE, 489 U.S. 527 (1989)	*passim*
Lindahl v. Office of Pers. Mgmt., 470 U.S. 768 (1985)	9
Lorillard v. Pons, 434 U.S. 575 (1978)	15
Mansell v. Mansell, 490 U.S. 581 (1989)	16
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)	15
Mudge v. United States, 308 F.3d 1220 (Fed. Cir. 2002)	*passim*
NFFE v. Cheney, 884 F.2d 603 (D.C. Cir. 1989)	8
NFFE v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987)	10
NTEU v. Bush, 891 F.2d 99 (5th Cir. 1989)	3, 8
NTEU v. Chertoff, C.A. No. 05-201, 2005 U.S. Dist. LEXIS 17216 (D.D.C. Aug. 12, 2005)	2, 11
NTEU v. Devine, 591 F. Supp. 1143 (D.D.C. 1984)	3
NTEU v. Devine, 733 F.2d 114 (D.C. Cir. 1984)	2, 11
NTEU v. Helfer, 53 F.3d 1289 (D.C. Cir. 1995)	2
NTEU v. Horner, 854 F.2d 490 (D.C. Cir. 1988)	2
NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974)	3
NTEU v. United States, 950 F.2d 1562 (Fed. Cir. 1991)	2

TABLE OF AUTHORITIES—Continued

	Page
NTEU v. United States, 54 Fed. Cl. 791 (2002)	2
NTEU v. U.S. Customs Serv., C.A. No. 79-1208, 1982 U.S. Dist. LEXIS 17952 (D.D.C. Feb. 18, 1982)	3
NTEU v. U.S. Customs Serv., 27 F.3d 623 (D.C. Cir. 1994)	3, 8
NTEU v. U.S. Dep't of Treasury, 25 F.3d 237 (5th Cir. 1994)	3
NTEU v. Von Raab, 489 U.S. 656 (1988)	*passim*
NTEU v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986, *vacated by* 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part by* 489 U.S. 656 (1989)	10
NTEU v. Weise, 100 F.3d 157 (D.C. Cir. 1996)	2
NTEU v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990)	3, 8
Pyner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997)	22
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994)	18
Rogers v. New York Univ., 220 F.3d 73 (2d Cir. 2000)	22
Skinner v. Ry. Labor Executives Assoc., 489 U.S. 602 (1989)	8
Steadman v. Governor, U.S. Soldiers' & Airmen's Home, 918 F.2d 963 (D.C. Cir. 1990)	29
United States v. Emmons, 410 U.S. 396 (1973)	18
United States v. Erika, 456 U.S. 201 (1982)	27
United States v. Fausto, 484 U.S. 439 (1988)	*passim*
United States v. NTEU, 513 U.S. 454 (1995)	3
United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989)	11
Weaver v. U.S. Info. Agency, 87 F.3d 1429 (D.C. Cir. 1996)	29

TABLE OF AUTHORITIES—Continued

	Page
Webster v. Doe, 486 U.S. 592 (1988)	5, 10
Weinberger v. Salfi, 422 U.S. 749 (1975)	10
Wilner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991)	8

STATUTES AND REGULATIONS

Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4361 (1994)	15, 16, 18
Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*	*passim*
5 U.S.C. § 702	8
5 U.S.C. § 704	8
5 U.S.C. § 706	8
Back Pay Act, 5 U.S.C. § 5596	2, 24, 26
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978)	*passim*
5 U.S.C. § 2302(a)	28
5 U.S.C. § 2302(a)(2)	27
5 U.S.C. § 2302(a)(2)(A)	24
5 U.S.C. § 2302(a)(2)(A)(x)	28
5 U.S.C. § 2302(a)(2)(A)(xi)	28
5 U.S.C. § 2302(b)	27, 28
5 U.S.C. § 2302(b)(1) – (b)(12)	13, 27
5 U.S.C. § 4303	24
5 U.S.C. § 7103(a)(9)	12
5 U.S.C. § 7121	18, 19
5 U.S.C. § 7121(a)(1)	*passim*
5 U.S.C. § 7121(a)(2)	12, 19
5 U.S.C. § 7121(d)	13, 15, 19
5 U.S.C. § 7121(e)	13, 15, 19
5 U.S.C. § 7121(g)	13, 19
5 U.S.C. Ch. 75	24

TABLE OF AUTHORITIES—Continued

	Page
Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*	*passim*
29 U.S.C. § 216(b)	4
Federal Pay Comparability Act,	
5 U.S.C. § 5303	2
5 U.S.C. § 5305(a)	3
Freedom of Information Act, 5 U.S.C. § 552	3
Prevailing Rate Act, 5 U.S.C. § 5341	2, 10
Privacy Act, 5 U.S.C. § 552a	3
Tucker Act, 28 U.S.C. § 1491	2, 10, 24
5 U.S.C. § 1214(a)	27
19 U.S.C. § 267	2
28 U.S.C. § 1331	*passim*
49 U.S.C. § 40122(G)	27
49 U.S.C. § 40122(g)(1)	12
49 U.S.C. § 40122(g)(2)(A)	12, 27, 28
49 U.S.C. § 40122(g)(2)(C)	12
49 U.S.C. § 40122(g)(3)	12
49 U.S.C. § 40122(g)(2)(H)	12
49 U.S.C. § 45104(8)	8

MISCELLANEOUS

"Authority To Investigate Complaints by Employees of the Federal Aviation Administration Alleging Reprisal for Whistleblowing," 21 Op. O.L.C. 178 (Sept. 23, 1997)	28
Federal Employee Fairness Act of 1994, H. Rep. No. 103-599, pt. 1 (1994)	17
Federal Employee Fairness Act of 1994, H. Rep. No. 103-599, pt. 2 (1994)	18
H.R. Rep. No. 95-1717 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860	15
H.R. 2721	17, 18, 19

TABLE OF AUTHORITIES—Continued

	Page
H.R. 2970	*passim*
S. Rep. No. 95-969 (1978)	25
To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv., 103d Cong. (1993)	16
139 Cong. Rec. H6379 (daily ed. Aug. 6, 1993)	16
140 Cong. Rec. H10614 (daily ed. Oct. 3, 1994)	18
140 Cong. Rec. H11422 (daily ed. Oct. 7, 1994)	18
140 Cong. Rec. S14670 (daily ed. Oct. 7, 1994)	18

IN THE

Supreme Court of the United States

No. 04-1131

TERRY L. WHITMAN,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS* [1]

The National Treasury Employees Union (NTEU or the Union) is a federal sector labor organization that represents the interests of approximately 150,000 employees of the federal government nationwide. NTEU negotiates collective bargaining agreements, arbitrates grievances, and files unfair labor practice charges on behalf of the employees it represents.

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. No attorney for either party has authored this brief in whole or in part, and no person or other entity, other than the *amicus*, made any monetary contribution to the preparation or submission of this brief.

Because conditions of federal employment are governed largely by provisions of federal law, including the Constitution, preserving employees' direct access to the federal courts is extremely important to NTEU and its members. NTEU has frequently represented its members' interests in federal court in a variety of matters, including: 1) suits in the United States Court of Federal Claims or the federal district courts based on violations of money-mandating statutes and brought under the Tucker Act, 28 U.S.C. § 1491, and the Backpay Act, 5 U.S.C. § 5596;[2] 2) pre-enforcement challenges to illegal agency regulations or policies under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*;[3] 3) actions for declaratory and injunctive relief involving statutes, regulations, or agency

[2] *See, e.g., Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g) (suit for back pay under Prevailing Rate Act, 5 U.S.C. § 5341); *NTEU v. United States*, 950 F.2d 1562 (Fed. Cir. 1991) (suit for overtime under 19 U.S.C. § 267); *NTEU v. United States*, 54 Fed. Cl. 791 (2002) (action for back pay on behalf of class of "special rate" federal employees denied annual adjustments mandated by 5 U.S.C. § 5303).

[3] *E.g., NTEU v. Weise*, 100 F.3d 157 (D.C. Cir. 1996) (challenging Customs regulation exempting employees from statutory overtime entitlement); *NTEU v. Helfer*, 53 F.3d 1289 (D.C. Cir. 1995) (challenging Office of Personnel Management (OPM) regulation exempting Federal Deposit Insurance Corporation from competitive hiring requirements); *NTEU v. Horner*, 854 F.2d 490 (D.C. Cir. 1988) (challenging OPM regulation exempting positions from competitive hiring requirements); *NTEU v. Devine*, 733 F.2d 114 (D.C. Cir. 1984) (challenging OPM regulations governing pay and other matters); *NTEU v. Chertoff*, C.A. No. 05-201, 2005 U.S. Dist. LEXIS 17216 (D.D.C. Aug. 12, 2005) (challenging regulations establishing a new human resources management system at the Department of Homeland Security).

policies that violate the Constitution, brought under 28 U.S.C. § 1331;[4] and 4) actions in district court where employees allege other statutory violations.[5]

In these cases, the United States has routinely argued that federal employees could not pursue their claims directly in federal court. Of particular relevance here is the decision of the Federal Circuit in a case that NTEU litigated—*Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990)—as well as NTEU's efforts to secure legislation clarifying 5 U.S.C. § 7121(a)(1) in the wake of that decision. In *Carter*, the Federal Circuit held that the former version of section 7121(a)(1) stripped hundreds of NTEU-represented employees of their

[4] *E.g., Bowsher v. Synar*, 478 U.S. 714 (1986) (challenging constitutionality of Gramm-Rudman-Hollings Act, which eliminated federal retiree cost-of-living adjustment); *United States v. NTEU*, 513 U.S. 454 (1995) (holding statutory "honoraria" ban unconstitutional as applied to rank-and-file federal employees); *NTEU v. Von Raab*, 489 U.S. 656 (1988) (constitutional challenge to urinalysis drug-testing program at the U.S. Customs Service); *NTEU v. U.S. Customs Serv.*, 27 F.3d 623 (D.C. Cir. 1994) (random urinalysis at U.S. Customs Service); *NTEU v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (holding unconstitutional, in part, urinalysis testing of employees of U.S. Department of Agriculture); *NTEU v. Bush*, 891 F.2d 99 (5th Cir. 1989) (challenge to Executive Order mandating government-wide urinalysis testing of federal employees); *NTEU v. U.S. Dep't of Treasury*, 25 F.3d 237 (5th Cir. 1994) (Fifth Amendment challenge to government questionnaire required for positions of public trust); *NTEU v. Devine*, 591 F. Supp. 1143 (D.D.C. 1984) (takings clause challenge to denial of cost-of-living adjustments to federal retirees).

[5] *E.g., Brune v. Internal Revenue Serv.*, 861 F.2d 1284 (D.C. Cir. 1988) (claim for damages by federal employee alleging violation of Privacy Act, 5 U.S.C. § 552a, during internal investigation); *NTEU v. U.S. Customs Serv.*, C.A. No. 79-1208, 1982 U.S. Dist. LEXIS 17952 (D.D.C. Feb. 18, 1982) (seeking access to studies of employee overtime under the Freedom of Information Act, 5 U.S.C. § 552); *NTEU v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (mandamus action to require President to implement statutory pay adjustment pursuant to the Federal Pay Comparability Act, 5 U.S.C. § 5305(a)).

explicit individual statutory right to file suit in district court under the Fair Labor Standards Act, 29 U.S.C. § 216(b), because such claims were also covered by the negotiated grievance procedure. 909 F.2d at 1458.

In 1994, Congress responded favorably to NTEU's efforts to secure a clarification of the law by amending section 7121(a)(1) to overturn *Carter* and to clarify that the negotiated grievance procedure is only exclusive as to other administrative remedies, not as to judicial causes of action. Thereafter, NTEU provided legal representation to a federal employee before the Federal Circuit and obtained a decision from that court holding that the 1994 amendment reversed the *Carter* ruling. *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002). *Accord, ASEDAC v. Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003).

Nonetheless, the Ninth Circuit held, in conflict with the Federal and Eleventh Circuits, that federal employees may not invoke the jurisdiction of the federal courts to resolve legal claims that are related to their employment, where such claims are also covered by the grievance-arbitration procedure of an applicable collective bargaining agreement. The Ninth Circuit's decision would nullify the 1994 amendment, thereby resurrecting the result of the now statutorily-repudiated *Carter* decision. For those reasons, and given the importance of the jurisdictional issues presented, NTEU files this brief.

SUMMARY OF ARGUMENT

It is well established that the federal courts have jurisdiction under 28 U.S.C. § 1331, entirely independent of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (CSRA), to resolve federal employees' challenges to the constitutionality of urinalysis drug-testing programs. Nonetheless, the Ninth Circuit held below (Pet. App. 7a; 10a) that federal courts lack jurisdiction over all "employment-related" claims by federal workers, except in-

sofar as such jurisdiction is explicitly conferred by the CSRA. This ruling is inconsistent with the federal courts' routine exercise of jurisdiction over complaints similar to petitioner's, including this Court's exercise of such jurisdiction in *NTEU v. Von Raab*, 489 U.S. 656 (1988). It is also irreconcilable with the long-recognized presumption that agency actions are subject to judicial review and with this Court's long-standing policy of avoiding statutory constructions that would deny any judicial forum for a colorable constitutional claim. *See, e.g.*; *Webster v. Doe*, 486 U.S. 592, 603 (1988).

The Ninth Circuit's approach—holding that the district court lacked jurisdiction over petitioner's claim because nothing in the CSRA, including 5 U.S.C. § 7121(a)(1), as amended, conferred it—turned the proper analysis of the jurisdictional question on its head. The question on which this Court has granted review, and as properly framed in the petition for certiorari, is whether section 7121(a)(1) precluded the exercise of federal court jurisdiction, which exists independent of the provisions of the CSRA.

Indeed, the Ninth Circuit's pronouncement (Pet. App. 7a) that the federal courts lack jurisdiction over all "employment-related" claims by federal employees has sweeping implications. It would call into question the authority of the federal courts to hear a broad variety of cases over which they have traditionally exercised jurisdiction. These matters include suits like petitioner's that seek equitable relief for constitutional violations; suits in the Court of Federal Claims for damages under money-mandating statutes; and civil actions brought under the APA to challenge agency rules and regulations alleged to be inconsistent with statutes governing federal employees' rights.

There is nothing in the language, structure, or history of the CSRA to suggest that Congress intended the radical curtailment of federal employees' rights and the narrowing of federal court jurisdiction that follow from the Ninth Circuit's

approach. Indeed, Congress amended the CSRA in 1994 to reject the view that the Ninth Circuit embraced, under which employees are divested of their rights to pursue judicial redress and relegated to a union-controlled grievance procedure to adjudicate all legal claims related to federal employment.

As modified in 1994, 5 U.S.C. § 7121(a)(1) now provides, in pertinent part, that the grievance procedures found in a collective bargaining agreement "shall be the exclusive *administrative* procedures" for resolving covered grievances (emphasis added). Congress inserted the word "administrative" into section 7121(a)(1) in 1994 precisely for the purpose of repudiating the decision of the Federal Circuit in *Carter v. Gibbs*, 909 F.2d 1452 (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990), which had held that the prior version of the statute made the grievance procedure exclusive as to all other remedies, whether administrative or judicial. Under the lower court's ruling, this purposeful modification of the statute would have no effect at all. Employees covered by collective bargaining agreements (including those who have decided not to join the union) would be precluded from seeking judicial remedies, even for violations of their constitutional rights, and would be left only with a negotiated procedure under which their union—in its sole discretion—decides whether or not to pursue their claims to arbitration.

The Ninth Circuit's conclusion (Pet. App. 9a) that petitioner's claims were barred by this Court's decisions in *United States v. Fausto*, 484 U.S. 439 (1988), and *Karahalios v. NFFE*, 489 U.S. 527 (1989), was also erroneous. The Ninth Circuit employed an overly broad reading of the Court's holdings in those cases that was divorced from their underlying rationale.

In *Karahalios*, this Court declined to recognize an implied cause of action to enforce the duty of fair representation that the CSRA itself created, because Congress had designed a

scheme of administrative and judicial review to resolve such unfair labor practices. 489 U.S. at 536. *Fausto* established that the CSRA's scheme for resolving "adverse personnel actions" (*i.e.*, management actions taken on the basis of an employee's conduct or performance) evinced a congressional intent to preclude direct judicial review of such matters, except as provided in that scheme. 484 U.S. at 443-45. In both cases, the Court relied upon the specific language, structure, and history of the CSRA to identify evidence of deliberate congressional intent to preclude the employees there from bringing their legal claims directly to court. *Karahalios*, 489 U.S. at 533; *Fausto*, 484 U.S. at 443-44.

Petitioner's claims do not involve an adverse personnel action and do not arise out of rights granted by the CSRA. Further, petitioner is seeking equitable relief to remedy constitutional violations, and the administrative alternatives suggested by the Ninth Circuit do not provide for judicial review. Therefore, the Ninth Circuit erred when it held that Congress implicitly precluded employees like petitioner from seeking direct judicial review of violations of their constitutional and statutory rights arising out of urinalysis drug-testing programs.

ARGUMENT

I. SECTION 7121(a)(1), AS AMENDED, DOES NOT AFFECT THE RIGHT OF FEDERAL EMPLOYEES TO SEEK JUDICIAL REDRESS FOR VIOLATIONS OF THEIR CONSTITUTIONAL AND STATUTORY RIGHTS

A. The District Court Had Subject Matter Jurisdiction over Petitioner's Challenge to FAA's Drug-Testing Program Under 28 U.S.C. § 1331

Under 28 U.S.C. § 1331, the federal district courts have jurisdiction over civil actions that arise under the Constitu-

tion, laws, or treaties of the United States. Further, the Administrative Procedure Act (APA) provides that any individual who suffers a legal wrong as a result of final agency action for which there is no other remedy in court may file suit in district court unless a statute precludes judicial review or the action is committed to agency discretion by law. 5 U.S.C. §§ 702, 704, 706.

Urinalysis drug tests are "searches" within the meaning of the Fourth Amendment and are subject to its "reasonableness" standard, including the requirement that such tests not be administered on an arbitrary or discriminatory basis. *NTEU v. Von Raab*, 489 U.S. 656, 672 n.2 (1988); *Skinner v. Ry. Labor Executives Assoc.*, 489 U.S. 602, 621-22 (1989). While inartfully pled, the gravamen of petitioner's *pro se* complaint was that his employer, the Federal Aviation Administration (FAA), was violating these constitutional mandates (as well as a parallel statutory requirement, 49 U.S.C. § 45104(8)) by subjecting him to urinalysis drug tests on a non-random, targeted basis. As *Von Raab* illustrates, challenges of this nature are clearly within the subject matter jurisdiction of the federal courts under 28 U.S.C. § 1331. *E.g., NTEU v. U.S. Customs Serv.*, 27 F.3d 623 (D.C. Cir. 1994); *NTEU v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990); *NTEU v. Bush*, 891 F.2d 99 (5th Cir. 1989); *AFGE v. Roberts*, 9 F.3d 1464 (9th Cir. 1993); *AFGE v. Martin*, 969 F.2d 788 (9th Cir. 1992); *Wilner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991); *NFFE v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989).

B. The Ninth Circuit's Decision Requiring Petitioner To Establish that the CSRA *Conferred* Jurisdiction over His Claims on the Federal Courts Was Erroneous and Would Strip the Federal Courts of Jurisdiction over a Broad Variety of Legal Claims that They Have Traditionally Adjudicated

The Ninth Circuit did not consider the well-established and independent basis for federal court jurisdiction over petitioner's statutory and constitutional causes of action that is provided by section 1331 and the APA. Instead, it began its analysis by declaring that the federal courts lack jurisdiction over all "employment-related" claims by federal workers, except insofar as such jurisdiction is explicitly conferred by the CSRA. Pet. App. 9a-10a. Relying upon this mistaken premise, the Ninth Circuit concluded that the district court lacked jurisdiction over petitioner's claim because 5 U.S.C. § 7121(a)(1), as amended, did not provide an express grant of such jurisdiction. *Id.* at 10a.

The Ninth Circuit's approach is contrary to the well-established principle that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 778 (1985), quoting *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). This Court has found the presumption of judicial review rebutted only where there existed "specific language or specific legislative history that is a reliable indicator of congressional intent" to preclude judicial review, or where such intent is "'fairly discernible' in the detail of the legislative scheme." *Bowen v. Mich. Acad. of Physicians*, 476 U.S. 667, 673 (1986), quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). Where, as here, the claim seeks equitable relief for a violation of *constitutional* rights, a "heightened showing is required" because a "serious constitutional question" would arise "if a

federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12; *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975).

The Ninth Circuit's pronouncement that the federal courts lack jurisdiction over all "employment-related" claims by federal employees has sweeping implications, well beyond petitioner's case. Under its reasoning, an arbitrator, rather than this Court, should have resolved NTEU's constitutional challenge to drug testing in *Von Raab*. Further, the Ninth Circuit's reasoning brings into question the jurisdiction of the federal courts over cases brought under the APA to challenge the lawfulness of regulations issued by the Office of Personnel Management and other agencies. It would also divest the district courts and the Court of Federal Claims of their long-standing jurisdiction over claims for back pay, arising out of violations of money-mandating statutes, such as the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*; the Prevailing Rate Act, 5 U.S.C. § 5341; and the many premium pay provisions of Title 5. *See, e.g., Amell v. United States*, 384 U.S. 158 (1966) (holding that Court of Claims has Tucker Act jurisdiction over federal employee claims for back pay under federal statutes and regulations).[6]

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[6] In fact, the United States has pressed preclusion arguments in all of these contexts, based upon the same jurisdictional theories it promotes in this case. Other than in the Ninth Circuit, however, such preclusion arguments have consistently been rejected by the lower courts. *See NFFE v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987) (admonishing government counsel for having the "effrontery" to invoke what the court called a "discredited theory of subject matter jurisdiction"—namely, that the CSRA precluded it from reviewing federal employees' challenge to constitutionality of urinalysis drug testing); *see also NTEU v. Von Raab*, 649 F. Supp. 380, 384-385 (E.D. La. 1986), *vacated by* 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part by* 489 U.S. 656 (1989) (same); *Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g) (rejecting preclusion argument in suit for back pay under Prevailing Rate Act); *NTEU v. Devine*, 733 F.2d 114 (D.C. Cir. 1984) (affirming denial of motion to dismiss NTEU's pre-enforcement challenge to OPM regulations on grounds of CSRA preclusion); *NTEU v. Chertoff*, 2005 U.S. Dist. LEXIS 17216 at *49-*52 (denying government's motion to dismiss NTEU's challenge to lawfulness of regulations implementing new personnel system at the Department of Homeland Security).

The Ninth Circuit analyzed the jurisdictional question backwards. The issue is not whether section 7121(a)(1) conferred jurisdiction on the district court to consider petitioner's claims. Rather, the question before this Court, as properly framed in the petition for certiorari, is whether section 7121(a)(1) precluded the exercise of such jurisdiction, which exists independent of the provisions of the CSRA, as explained above.

C. Congress Amended 5 U.S.C. § 7121(a)(1) To Confirm that the Negotiated Grievance Procedure Is Exclusive only as to Other Administrative Remedies, and not as to Judicial Causes of Action

1. The plain language of the statute confirms that Congress was repudiating the Federal Circuit's decision in *Carter*, which held that negotiated procedures were exclusive as to judicial causes of action

The interpretation of a statute begins with its language. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). Where that language is clear, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

Petitioner is subject to the FAA Personnel Management System, which incorporates a number of the provisions of the CSRA, including 5 U.S.C. Chapter 71.[7] Chapter 71 codifies the Federal Sector Labor-Management Relations Statute, which established "the first statutory scheme governing labor relations between federal agencies and their employees," *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91 (1983), and which requires that collective bargaining agreements in the federal sector "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. § 7121(a)(1). Under 5 U.S.C. § 7103(a)(9), a "grievance" includes "any matter relating to the employment of the employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation, affecting conditions of employment." Because the collective bargaining agreement between the FAA and petitioner's union did not exclude statutory and constitutional challenges to drug tests from the scope of the grievance procedure, petitioner had the option of using that procedure to pursue those claims. *See* 5 U.S.C. § 7121(a)(2).

Section 7121(a)(1) of Title 5 currently provides, in pertinent part, that "[e]xcept as provided in subsections (d), (e), and (g) of this section, the [negotiated] procedures shall be

[7] The statute establishing the Federal Aviation Personnel Management System, as amended in 2000, permits the FAA Administrator to waive certain provisions of Title 5 of the United States Code governing federal personnel. 49 U.S.C. § 40122(g)(1). It nonetheless retains a number of the administrative procedures that are provided in the CSRA for review of "adverse personnel actions" and labor relations disputes, including: 1) the right to pursue grievances under collective bargaining agreements and to file unfair labor practices with the Federal Labor Relations Authority under Chapter 71 of Title 5 (*id.* § 40122(g)(2)(C)); 2) the right to file appeals of serious adverse personnel actions with the Merit Systems Protection Board, (*id.* § 40122(g)(2)(H) and (g)(3)); and 3) the right to file a complaint with the U.S. Office of Special Counsel under section 2302(b), "relating to whistleblower protection" (*id.* § 40122(g)(2)(A)).

the exclusive *administrative* procedures for resolving grievances which fall within its coverage" (emphasis added).[8] Before 1994, however, section 7121(a)(1) did not contain the word "administrative." Instead, it provided that the negotiated grievance procedure was the "exclusive procedure" for resolving matters that fell within its coverage. The absence of the word "administrative" led the Federal Circuit to read section 7121(a)(1) as the government urges it should still be read: to divest employees of their rights to pursue relief in federal court. *Carter v. Gibbs*, 909 F.2d 1452 (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990).

Carter arose out of a lawsuit brought under the FLSA, in which *amicus* NTEU provided legal representation to several hundred employees of the Internal Revenue Service. At the government's urging, the district court dismissed the suit on the grounds that 5 U.S.C. § 7121(a)(1), as then written, deprived it of jurisdiction over the plaintiffs' claims. *Carter v. Gibbs*, 690 F. Supp. 897 (C.D. Cal. 1988).

On appeal, a panel of the Federal Circuit held that the district court had misinterpreted section 7121(a)(1) to repeal by implication the plaintiffs' rights to bring FLSA enforcement actions in federal court. *Carter v. Gibbs*, 883 F.2d 1563 (Fed. Cir. 1989). Among other things, it observed that the legislative history of the CSRA signaled "that Congress in-

[8] Subsection (d) of section 7121 gives employees the right to elect the negotiated procedure or "statutory procedures" for resolving complaints of discrimination that constitute "prohibited personnel practices" under 5 U.S.C. § 2302(b)(1). Subsection (e) of 7121 preserves employees' rights to file appeals with the Merit Systems Protection Board to challenge serious adverse actions based on misconduct or poor performance, under Chapters 75 and 43 of Title 5. Subsection (g), which, like the word "administrative", was added to the statute in 1994, preserves employees' rights to file complaints with the Office of Special Counsel in cases involving prohibited personnel practices other than those identified in subsection (d).

tended the 'exclusive procedures' provision to foreclose access only to alternative administrative procedures for settling disputes, and not to bar judicial remedies expressly provided by other statutes." *Id.* at 1566-67.

The *en banc* Federal Circuit reversed. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc). It held that the text of section 7121(a)(1), in its original incarnation, contained no qualifying language confining its reach to "administrative" procedures and made the grievance procedure exclusive as to *all* other procedures, whether administrative or judicial. *Id.* at 1454-55.

The *en banc* panel's interpretation of section 7121(a)(1) was a dubious one. It ran afoul of the cardinal principle of statutory interpretation that disfavors repeals by implication (*United States v. Fausto*, 484 U.S. 439, 452 (1988)), and ignored the teachings of *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).[9] Further, the Federal Circuit failed to reconcile its conclusion with the statutory context in which the phrase "exclusive procedures" was used, or with the legislative history of the CSRA, which supported a significantly narrower reading of that phrase than the one the court endorsed. The statutory context as well as the direct history showed that Congress was only addressing the relationship between the negotiated grievance procedure and other administrative procedures for review of federal employment disputes when it enacted section 7121(a)(1), and

[9] *Barrentine* held that private-sector employees have an unfettered right to bring civil enforcement actions under the FLSA, without regard to collectively bargained procedures. 450 U.S. at 745. It held that FLSA rights are conferred on the plaintiffs "as individual workers, not as members of a collective organization," and that those rights "cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Id.* at 745, 740 (citations omitted).

that the provision had nothing whatsoever to do with direct judicial causes of action.[10]

In any event, in 1994, Congress corrected the Court's misinterpretation by adding to the statute the very term whose absence dictated the Federal Circuit's conclusion in *Carter*. Section 9(b) of the Act of October 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361 (1994). As modified, section 7121(a)(1) provides, in pertinent part, that a grievance procedure found in a federal sector collective bargaining agreement "shall be the exclusive *administrative* procedure for resolving covered grievances." (Emphasis added.)

It is well established, of course, that Congress is assumed to be aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Further, when Congress amends an existing statute, it is presumed to do so with knowledge of the interpretation that had been given to the existing statute, at least insofar as the amendment affects the existing statute. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

As the Federal Circuit held in *Mudge v. United States*, 308 F.3d 1220, 1228 (Fed. Cir. 2002), "[t]he plain language of § 7121(a)(1) as amended is therefore clear: while § 7121 (a)(1) limits the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her [collective bargaining agreement], the text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances." *Accord, ASEDAC*, 329 F.3d

[10] *See* H.R. Rep. No. 95-1717 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2891 (explaining that under the original version of section 7121(a)(1), with the exception of administrative remedies available at subsections (d) and (e), "an employee covered by a collective bargaining agreement must follow the negotiated procedures rather than the *agency* procedures available to other employees") (emphasis added); *see also* Petition for Writ of Certiorari at 16-19, *Carter v. Goldberg*, 498 U.S. 811 (1990) (No. 89-1675) (discussing legislative history).

at 1239, 1241. The contrary argument of the government in this case (Gov. Resp. at 15-19) is inconsistent with the statutory text and must be rejected.

2. The legislative history of the 1994 amendment supports the plain meaning of its text

As this Court has held, "only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 U.S. 70, 75 (1984); *see also Mansell v. Mansell*, 490 U.S. 581, 592 (1989). Here, there is *nothing* in the legislative history to support the government's reading of the statute as amended. In fact, the background of Congress' amendment of section 7121(a)(1) supports the plain meaning of its text, as described above.

Section 9(b) of the Act of October 29, 1994, which added the word "administrative" to section 7121(a)(1), was ultimately enacted as part of H.R. 2970. Representative McCloskey originally introduced H.R. 2970 in the House of Representatives in August 1993, and it was referred to the House Post Office and Civil Service Committee shortly thereafter. 139 Cong. Rec. H6379 (daily ed. Aug. 6, 1993).

The original version of H.R. 2970 did not include an amendment to section 7121(a)(1). At hearings on the bill, however, NTEU officials testified before the Subcommittee on the Civil Service that section 7121(a)(1) should be amended to overturn the result reached in *Carter*, which they urged had misinterpreted congressional intent. *See To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv.*, 103d Cong. 20-23 (1993) (hereinafter "Hearings"). Then-NTEU President Robert Tobias testified that the Union was proposing "a change to existing law,

as interpreted by the Federal Circuit in *Carter v. Gibbs*, to ensure the negotiated grievance procedure is the exclusive administrative procedure, but does not supplant any remedies which allow Federal employees to be heard directly in Federal court." Hearings at 23.[11]

On July 13, 1994, before action was taken on H.R. 2970, the House Committee on Education and Labor issued a report on another bill, H.R. 2721, which had also been introduced by Rep. McCloskey. H.R. 2721 included a provision *identical* to the one that ultimately became law, which would amend 5 U.S.C. § 7121(a)(1) to add the word "administrative." The Committee explained that the amendment

> clarifies Congress' original intent that the grievance procedure would be an exclusive administrative procedure for matters that it covers. The grievance procedure was never intended to deprive employees of access to the courts. This clarification is necessary to correct an erroneous decision of the U.S. Court of Appeals for the Federal Circuit, *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), cert. denied sub nom. *Carter v. Goldberg*, 111 S. Ct. 46 (1990), which denied employees the right to judicial review of claims under the Fair Labor Standards Act.

Federal Employee Fairness Act of 1994, H. Rep. No. 103-599, pt. 1, at 56 (1994).

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[11] *See also* Hearings at 21 (testimony of NTEU Assistant Counsel Timothy Hannapel) (proposing that section 7121(a)(1) be amended to ensure that the provision's exclusivity language conformed to Congress' original intent that the grievance procedure be exclusive only with respect to administrative remedies, and explaining that "Congress intended the grievance procedure to be a strong avenue but courts have misinterpreted that intent to take away the individual rights of individual employees [to go to court] under, for example, the overtime pay statutes and the Privacy Act . . . ").

The Committee on Post Office and Civil Service (the same committee that had held hearings on H.R. 2970) similarly reported favorably on H.R. 2721 on August 17, 1994. Its report stated that the purpose of the amendment "is to clarify that section 7121 is not intended to limit judicial remedies otherwise provided by law." *Federal Employee Fairness Act of 1994*, H. Rep. No. 103-599, pt. 2 at 16, 75 (1994).

Thereafter, in October 1994, Rep. McCloskey offered amendments to H.R. 2970 that included the language contained in H.R. 2721, adding the word "administrative" to section 7121(a)(1). 140 Cong. Rec. H10614 (daily ed. Oct. 3, 1994). H.R. 2970, including the amendments offered by Rep. McCloskey, passed both Houses of Congress on October 7, 1994, and was signed into law by the President on October 29, 1994. 140 Cong. Rec. S14670, H11422 (daily ed. Oct. 7, 1994); Pub. L. No. 103-424, § 9(b), 108 Stat. 4361, 4366 (1994).

The reports accompanying H.R. 2970 did not explain why Congress added the word "administrative" to section 7121(a)(1). Nonetheless, the reports that accompanied H.R. 2721, also offered by Rep. McCloskey, which would have made exactly the same change in section 7121(a)(1), are highly instructive, particularly when viewed against the backdrop of the hearing testimony NTEU officials presented on this issue. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 306-309 (1994) (examining legislative history of provision in vetoed bill that was identical to provision in later-enacted statute); *United States v. Emmons*, 410 U.S. 396, 405 n.14 (1973) (legislative history of unenacted bill "wholly relevant to an understanding of" subsequently enacted statute containing same operative language).

Thus, both H.R. 2721 and H.R. 2970 contained the identical "exclusive administrative procedures" language. Both bills were introduced by the same legislator (Rep. McCloskey). And, as described above, both bills were considered within

the same legislative session—in fact, within months of one another. Further, the explanation of the amendment to section 7121(a)(1) contained in the reports accompanying H.R. 2721 closely tracks the testimony that NTEU officials provided at the hearing on H.R. 2970. Therefore, it is clear that Congress intended to reverse *Carter* and to preclude only administrative claims covered by grievance procedures. Section 7121(a)(1), as amended, does not preclude employees from filing claims in federal district court.[12]

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[12] The *Mudge* court properly rejected the argument of the government, repeated here (Gov. Resp. at 18-19), that Congress added the word "administrative" "to clarify the remedies available to federal employees for grievances" in light of the new subsection (g) of section 7121, which gave federal employees a choice of administrative remedies for grievances concerning prohibited personnel practices. There was "no need for Congress to clarify § 7121 in this fashion" because the pre-1994 statute, which already provided a choice of administrative remedies under subsections (d) and (e), had unambiguously made the negotiated procedure exclusive as to other administrative remedies. *Mudge*, 308 F.3d at 1228.

Similarly unpersuasive, as the *Mudge* court understood (*id.* at 1231), was the government's contention there that the plain meaning of section 7121(a)(1) should be disregarded because to do otherwise would allegedly render superfluous section 7121(a)(2) (which provides that the parties may agree to exclude any matter from the coverage of the negotiated procedure). The government based this contention on the erroneous notion that the sole function of subsection (a)(2) is to enable the union to preserve employees' rights to pursue judicial remedies by excluding matters from the coverage of the negotiated procedure. *See* 308 F.3d at 1231. The parties to a collective bargaining agreement may wish to exclude matters from the grievance procedure for any number of reasons, entirely unrelated to the effect of such exclusion upon employees' rights to judicial relief. These reasons range from the union's desire not to devote its resources to particular issues to an interest in channeling particular types of disputes to other administrative forums.

3. The policy arguments of the government are without merit

In its response to the petition for certiorari, the government makes several policy arguments in support of its tortured reading of section 7121(a)(1). *See* Gov. Resp. at 20-21. Of course, the government's policy arguments cannot overcome the plain language of the statute. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000). In any event, the government's arguments are meritless.

For example, the government claims (Gov. Resp. at 16-17) that giving section 7121(a)(1) its plain meaning, as *Mudge* required, "produces an anomalous result" under which employees who are covered by collective bargaining agreements have access to the federal courts while employees who are not so covered would be forced to litigate those cases exclusively through an internal agency grievance procedure. This contention rests upon the flawed central premise of its entire argument—namely, that *Mudge* held that section 7121(a) *conferred* jurisdiction on the federal courts to resolve legal claims that also constitute "grievances." On the contrary, *Mudge* held that section 7121(a)(1) does not *preclude* the federal courts from exercising the jurisdiction they otherwise possess over a federal employee's legal claims, solely because those claims are also covered by the negotiated grievance procedure. *See* 308 F.3d at 1227-33. This is, of course, materially different from a holding that section 7121(a)(1) operates as a new substantive grant of jurisdiction on the federal courts to resolve "grievances."

This reading of section 7121(a)(1) ensures that employees who are unrepresented by a union will not have greater rights of access to the federal courts than those who are so represented. In order to file suit directly in federal court, all employees, whether covered by a negotiated procedure or not, must still identify an independent statutory basis for the

federal courts to exercise their jurisdiction. Both categories of employees thus have *equal* rights.

For similar reasons, there is no merit to the argument of the government that, if the court's decision in *Mudge* stands, then the federal government will be compelled to litigate employee grievances in court "in the first instance," thereby resulting in "considerable delay and additional expense." Gov. Resp. at 21. As described below at pp. 25-26, consistent with this Court's decision in *Fausto*, all federal employees, both those who are covered by negotiated procedures and those who are not, are still precluded from invoking the jurisdiction of the district courts for the kinds of "exceptionally common" grievances to which the government apparently refers: the routine challenges employees pose to management assessments of their conduct and performance in the context of "adverse personnel action" cases—namely, removals, suspensions, denials of promotions, and the like. Similarly, consistent with this Court's decision in *Karahalios (see infra* p. 23), employees must also use the CSRA's administrative procedures to resolve labor relations disputes (*i.e.*, unfair labor practices and disputes over negotiability). These two categories, along with breaches of the collective bargaining agreement, comprise the vast majority of "grievances" filed.

It bears noting that, although 5 U.S.C. § 7121(a)(1) was amended over ten years ago, there is no evidence of a surge in federal employee suits brought in district court. As has been the case for over thirty years (and even before the decision of the Federal Circuit in *Carter*), employees tend to use their administrative remedies (including the negotiated procedure), even in many cases where judicial remedies also exist, because those administrative procedures are less formal and can often provide adequate relief to employees without the expense of hiring counsel.

Indeed, it is the government's argument that leads to anomalous results. For under the government's interpretation of

section 7121(a)(1), unions that agree to a broad scope grievance procedure in a collective bargaining agreement can divest covered employees of their individual entitlements to file suit to vindicate express statutory and even constitutional rights. Employees represented by unions (including those who choose not to join the union) would be left with only a negotiated grievance procedure, under which the union—in its sole discretion—decides whether or not to pursue their claims to arbitration.

This result is contrary to important public policies because a union, which has a statutory obligation to represent collective interests, may reasonably decide not to pursue the claims of a single individual. *See Barrentine*, 450 U.S. at 742 (holding that it would be contrary to the public interests underlying the FLSA to deny employees their rights to pursue overtime claims in federal court and to relegate them exclusively to the union-controlled grievance procedure). Unions are entitled to consider such factors as limited resources, competing interests, and a desire to maintain harmony among employees and their employer, when deciding whether to invoke arbitration. *See Pyner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997) (holding that negotiated grievance procedure does not preclude employees from pursuing judicial redress for violations of Title VII of the Civil Rights Act or other anti-discrimination statutes). [13]

For example, federal sector unions routinely negotiate with agencies concerning the procedures that will be used in conducting urinalysis drug testing of bargaining unit employees. In pursuing an agreement, the union must establish priorities based on the needs of the bargaining unit as a whole. It is certainly conceivable, therefore, that an individual employee might conclude that the negotiated testing procedures do not provide constitutionally adequate safeguards to ensure sufficiently reliable tests or random selection of employees. It is unlikely that the union would pursue the employee's statutory and constitutional claims in this circumstance. Thus, the result of the government's position here is that even the rights guaranteed to individuals under the Fourth Amendment, as well as their Fifth Amendment due process rights, could be unilaterally waived by their bargaining representative.

In short, considerations of policy do not support the government's tortured reading of section 7121(a)(1) as amended; indeed, they refute it. Accordingly, this Court should endorse the interpretation of section 7121(a)(1) that its plain language and legislative history require and reject the government's invitation to rewrite the statute to defy Congress' decision to repudiate the result in *Carter*.

II. THE CSRA DOES NOT IMPLICITLY PRECLUDE PETITIONER FROM PURSUING EQUITABLE RELIEF DIRECTLY IN FEDERAL COURT TO CHALLENGE VIOLATIONS OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS ARISING OUT OF FAA'S DRUG-TESTING PROGRAM

The Ninth Circuit relied upon this Court's decisions in *Fausto* and *Karahalios* for its holding that the federal courts lack jurisdiction over the "employment-related" legal claims of federal employees. *See* Pet. App. 9a-10a. Its reliance on these decisions was misplaced.

In *Karahalios*, this Court held that federal employees do not have an implied cause of action to enforce a union's duty

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[13] For these reasons, a general consensus has emerged among the lower courts that, while *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), holds that an individual may prospectively waive his own statutory right to a judicial forum and agree to arbitrate violations of law, a union may not prospectively do so for him. *See Air Line Pilots Ass'n v. Northwest Airlines*, 199 F.3d 477, 484 (D.C. Cir. 1999), *judgment reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (en banc) (digesting cases); *Rogers v. New York Univ.*, 220 F.3d 73, 75 & n.1 (2d Cir. 2000) (same).

of fair representation because the CSRA provided a comprehensive remedy for violation of that statutorily created obligation (an unfair labor practice charge filed with the FLRA, with judicial review in the regional courts of appeals). 489 U.S. at 533. Petitioner, however, is not seeking to enforce a right created by the CSRA; the question here is whether the CSRA implicitly precludes the federal courts from considering a cause of action conferred by the APA and from exercising their traditional jurisdiction under 28 U.S.C. § 1331 to address petitioner's statutory and constitutional challenges.

This Court's decision in *Fausto* is similarly inapposite. There, a non-veteran member of the "excepted service" challenged his suspension for misconduct under Chapter 75 of the CSRA by filing an action directly in the then-United States Claims Court pursuant to the Tucker Act, 28 U.S.C. § 1491, and the Back Pay Act, 5 U.S.C. § 5596. 484 U.S. at 443. This Court held that the Claims Court lacked jurisdiction over the employee's cause of action in light of the CSRA's scheme for review of adverse personnel actions.[14] *Id.* at 454-55.

In so ruling, the Court relied upon the language and structure of the CSRA, which it held evinced a "deliberate" decision by Congress to preclude employees who fell within Fausto's particular category (non-veteran members of the federal excepted service) from securing direct judicial review in a particular category of cases (adverse personnel actions).

[14] The phrase "adverse personnel action" is a term of art that is frequently used in federal sector parlance to describe a variety of personnel actions that may be taken against employees by management ostensibly on the basis of an assessment of an individual's performance or conduct. *See* 5 U.S.C. Ch. 75 (entitled "Adverse Actions"); 5 U.S.C. § 4303 ("Actions based on unacceptable performance"); 5 U.S.C. § 2302(a)(2)(A) (defining "personnel actions"). These include, among other things, removals, demotions, suspensions, reductions in pay, and negative performance evaluations. *See Fausto*, 484 U.S. at 446-447.

Id. at 455; *see also id.* at 443-44 (observing that "the CSRA 'comprehensively overhauled the civil service system,' . . . creating an elaborate 'new framework *for evaluating adverse personnel actions* against [federal employees], . . . '" and that the CSRA "prescribes in great detail the protections and remedies applicable *to such action* . . ."(citations omitted, emphasis added)).[15]

As this Court recognized, one of the central objectives of the CSRA was to reform a complicated system of administrative and judicial review of personnel actions that Congress considered an obstacle to management objectives of punishing misconduct and addressing inadequate job performance. *Fausto*, 484 U.S. at 445; *see also Cornelius v. Nutt*, 472 U.S. 648, 662 (1985), quoting S. Rep. No. 95-969, at 4 (1978) (noting that "one of the 'central tasks' of the Act was to '[a]llow civil servants to be able to be hired and fired more easily, but for the right reasons'"). Permitting an employee to pursue a direct judicial remedy in misconduct and performance cases would undermine that goal. Further, the structure of the CSRA demonstrated that Congress did not intend the category of employees at issue in *Fausto* to have any adverse action rights at all.

Significantly, the Court in *Fausto* did not base its decision upon the fact that the employee's legal claims were "employment-related," as the Ninth Circuit held (Pet. App. 9a-10a) and as the government asserts (Gov. Resp. at 12). On the contrary, the Court's decision was grounded in Congress'

[15] As the court noted in *Fausto*, Chapter 43 of Title 5, governing performance-based adverse actions, extended procedural protections to excepted service employees, but deliberately withheld from them the "right to seek either administrative or judicial review of the agency's final action." 484 U.S. at 446. In addition, the Court found it critical that Chapter 75, which governs adverse actions based on misconduct, defined on its face and with great precision the review rights of excepted service employees. *Id.* at 446-47.

clearly expressed intent with respect to the *specific type* of claim at issue—a challenge to a disciplinary suspension. This Court summarized its decision as holding that Congress' "deliberate exclusion of *employees in respondent's service category* from the provisions establishing administrative and judicial review *for personnel action of the sort at issue here* prevents respondent from seeking review in the Claims Court under the Back Pay Act." 484 U.S. at 455 (emphasis added).

For this reason, as the Federal Circuit has correctly held, *Fausto* is not preclusive as to *all* causes of action related to federal employment. *See Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (on reh'g) (holding that *Fausto* did not affect the long-standing authority of the Court of Federal Claims to hear federal employees' pay claims, based on money-mandating statutes). The court explained that *Fausto* focused on "'precisely drawn provisions' with respect to Board and judicial review of adverse actions . . . within Chapter 75 of the CSRA to infer a congressional judgment to preclude Board and judicial review altogether of adverse actions against non-preference eligible excepted service employees." 976 F.2d at 713 (citation omitted). As the court stressed, *Fausto* was grounded in "the peculiar context of adverse personnel actions," which "necessarily focus on the agency's appraisal of the misconduct of a particular employee." *Id.* at 714.

The Ninth Circuit completely overlooked this crucial distinction. Petitioner's claims do not involve an adverse personnel action—the type of claim at issue in *Fausto*. His claim concerns an allegedly illegal and unconstitutional drug-testing program, precisely the type of claim at issue in *Von Raab*.

The Ninth Circuit (Pet. App. 3a; 10a) purported to identify two possible options that the petitioner might have pursued under the CSRA to press his allegations of illegal and unconstitutional drug testing: 1) filing a grievance under the negotiated procedure, or 2) filing a complaint with the U.S.

Office of Special Counsel (OSC), alleging that requiring him to undergo the drug tests was a "prohibited personnel practice."[16]

These options, however, are a far cry from the kind of "precisely drawn provisions" (*United States v. Erika*, 456 U.S. 201, 208 (1982)) from which the Court inferred congressional intent to preclude a direct judicial cause of action in *Fausto*.

First, as described above, it is abundantly clear that Congress did not intend that petitioner's right to pursue his claims in the negotiated grievance procedure would preclude him from obtaining direct judicial review of his challenge to the drug-testing program. On the contrary, Congress amended the statute in 1994 to ensure the opposite result, and to reject an interpretation of the CSRA under which an employee's union could waive his right to secure judicial review by negotiating a grievance procedure covering the substance of his claims.

The other option the Ninth Circuit suggested (Pet. App. 10a)—filing a prohibited personnel practice complaint with OSC—is not an option at all for petitioner. OSC disavows any authority to investigate the complaints of FAA employees, except with regard to claims for whistleblower retaliation, and the statute does not provide such authority.[17] Fur-

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[16] The U.S. Office of Special Counsel (OSC) is an independent agency that has jurisdiction to, among other things, receive and investigate complaints alleging the commission of "prohibited personnel practices," as defined at 5 U.S.C. § 2302(b). *See* 5 U.S.C. § 1214(a). A "prohibited personnel practice" occurs when an agency takes or threatens to take a "personnel action" (as defined at 5 U.S.C. § 2302(a)(2)) on one of the twelve illegal bases specified at 5 U.S.C. § 2302(b)(1)-(b)(12)).

[17] *See* www.osc.gov/ppp.htm#q2 (visited Aug. 30, 2005). Pursuant to 5 U.S.C. § 1214(a), OSC has jurisdiction to receive and investigate complaints alleging the commission of "prohibited personnel practices," as defined at 5 U.S.C. § 2302(b). Section 1214 of Title 5 is applicable to FAA employees under 49 U.S.C. § 40122(g)(2)(A) and (G). However,

ther, OSC's authority to receive and investigate complaints alleging the commission of "prohibited personnel practices" is limited to cases challenging a "personnel action" that was either threatened or taken. 5 U.S.C. § 2302(b). The definition of "personnel action" under 5 U.S.C. § 2302(a) does not include directing an employee to submit to a drug test. *See Bush v. Lucas*, 462 U.S. 367, 385 n.28 (1983) (observing that "certain actions by supervisors against federal employees, such as . . . warrantless searches, . . . would not be defined as 'personnel actions' within the statutory scheme").[18]

More important, even if the petitioner could fashion a claim that might arguably fall within OSC's authority to investigate, there is nothing in the CSRA to demonstrate that, in giving OSC such authority, Congress intended to concomitantly preclude employees from pursuing equitable relief for constitutional violations in federal court. A decision by OSC not to prosecute an employee's claim—even a constitutional one—is final and unreviewable. As a result, employees

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the provisions of 5 U.S.C. § 2302(b) (defining the prohibited personnel practices that OSC may investigate) are inapplicable to FAA employees, with the exception of those "relating to whistleblower protection." 49 U.S.C. § 40122(g)(2)(A). Indeed, until the law was amended in 2000 to add a reference preserving the "provisions for investigation and enforcement as provided in chapter 12 of Title 5," the Justice Department had interpreted Title 49 to divest OSC of jurisdiction over whistleblower claims as well. *See* "Authority To Investigate Complaints by Employees of the Federal Aviation Administration Alleging Reprisal for Whistleblowing," 21 Op. O.L.C. 178 (Sept. 23, 1997).

[18] While a decision to order a psychiatric examination is identified by statute as a "personnel action" (5 U.S.C. § 2302(a)(2)(A)(x)), a direction to take a urinalysis drug test is not. Nor would the order to submit to a drug test be considered a "significant change in . . . working conditions." 5 U.S.C. § 2302(a)(2)(A)(xi). The phrase "working conditions" is generally read to encompass the physical circumstances under which work is performed. *See Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645-646 (1990) (term "working conditions" most naturally refers to "circumstances" or "state of affairs attendant to one's performance of a job").

alleging a violation of their constitutional rights would have no judicial forum to hear those claims. Because such an outcome would present a "serious constitutional question" (*see* cases cited *supra* p. 9) and violate established precepts regarding the availability of judicial review of constitutional claims, the statute must not be interpreted in such a fashion, particularly in the absence of a clear expression of congressional intent.[19]

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[19] There is no merit to the argument of the government that, even if petitioner may ultimately secure judicial review of his challenge to the FAA drug-testing program, he should be required to exhaust administrative remedies for pursuing his claims. Gov. Resp. at 23-26. One lower court—the D.C. Circuit—has required exhaustion where a constitutional claim is intertwined with or related to an adverse personnel action or with a claim that arises under the CSRA, if the CSRA remedy would be "fully effective" in remedying the constitutional violation. *E.g., Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1433-34 (D.C. Cir. 1996); *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990). Petitioner's claims, however, do not involve an adverse personnel action or arise out of rights created by the CSRA; petitioner is seeking prospective relief against future unconstitutional drug tests. Even under the D.C. Circuit's approach, exhaustion is not required for claims seeking such relief. *See Weaver*, 87 F.3d at 1434 (holding that the employee was entitled to judicial review of her First Amendment challenge to a regulation despite theoretical availability of administrative remedy for oral admonishment). Further, as described above, petitioner's only administrative remedy would be to file a grievance under the negotiated procedure. In amending the statute in 1994, Congress made it clear that the existence of the grievance option does not affect employees' rights to seek relief directly in federal court. Requiring exhaustion of the negotiated grievance procedure would frustrate this intent. The government's exhaustion argument, accordingly, should be rejected.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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No. 04-1131

IN THE

Supreme Court of the United States

Terry L. Whitman,

Petitioner,

v.

U.S. Department of Transportation, *et al.*

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. In light of 5 U.S.C. 7121 – the provision of the Civil Service Reform Act that describes the administrative grievance procedures negotiated pursuant to collective bargaining agreements – are federal district courts categorically barred from hearing suits by federal employees seeking equitable relief from allegedly unconstitutional employment practices?

2. Does the Civil Service Reform Act preclude federal courts from granting equitable relief for constitutional and statutory claims brought by federal employees in cases where the courts would otherwise have an independent basis for exercising jurisdiction?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were the petitioner, Terry L. Whitman, and the respondents, the United States Department of Transportation and Norman Y. Mineta, the Secretary of Transportation.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceedings Below ii
Table of Contents iii
Table of Authorities v
Opinions Below 1
Jurisdiction 1
Relevant Constitutional and Statutory Provisions 1
Statement 1
I. Statutory Framework 2
II. The FAA's Drug Testing Program 7
III. Proceedings Below 8
Summary of Argument 12
Argument 14
I. Federal District Courts Presumptively Have Jurisdiction Over Suits, Such as Petitioner's, That Seek Equitable Relief for Constitutional Claims 14
II. Nothing About Section 7121 Strips the Federal Courts of Their Jurisdiction To Hear Petitioner's Constitutional Claims 21
A. This Case Is Governed By the Strong Presumption – Which This Court Has *Never* Found Overcome – That Federal Statutes Do Not Preclude All Judicial Review of Constitutional Claims 21
B. The Plain Language of Section 7121 Makes Clear Congress' Intent Only To Channel Administrative Complaints and Not To Foreclose Judicial Remedies 28

C. The History of Section 7121 Reinforces the Conclusion That Congress Did Not Strip the Courts of the Power To Resolve Constitutional Claims 32

D. The Court of Appeals' Construction of Section 7121 Would Produce Absurd and Unjust Results That Congress Could Not Have Intended 35

E. This Court Should Not Require Plaintiffs Like Petitioner To Exhaust Negotiated Grievance Procedures Before Seeking Judicial Review 40

III. The District Court Also Retained Its Jurisdiction To Hear Petitioner's Statutory Claim 44

Conclusion 47

Constitutional and Statutory Appendix ..... App. 1

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 14, 26, 38-39

Albright v. *United States*, 26 Cl. Ct. 1119 (1992) 33

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 39-40

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 15

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 19

Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 19

Asociacion de Empleados del Area Canalera v. *Panama Canal Comm'n*, 329 F.3d 1235 (CA11 2003) 12, 27, 28

Babbitt v. *Sweet Home Chapter*, 515 U.S. 687 (1995) 28

Baker v. *Carr*, 369 U.S. 186 (1962) 16

Bartlett v. *Bowen*, 816 F.2d 695 (CADC 1987) 27

Battle v. *FAA*, 393 F.3d 1330 (CADC 2005) 4

Bell v. *Hood*, 327 U.S. 678 (1946) 1, 16, 19, 20

Bender v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986) 19

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) 20

Blessing v. *Freestone*, 520 U.S. 329 (1997) 29

Block v. *Cmty. Nutrition Inst.*, 467 U.S. 340 (1984) 23

Bolling v. *Sharpe*, 347 U.S. 497 (1954) 16

Bowen v. *Michigan Acad. of Family Physicians*, 476 U.S. 667 (1986) 22, 26

Bush v. *Lucas*, 462 U.S. 367 (1983) 20, 21, 25-26

Califano v. *Sanders*, 430 U.S. 99 (1977) 18

Camara v. *Municipal Court*, 387 U.S. 523 (1967) 17

Carlson v. *Green*, 446 U.S. 14 (1980) 20

Carter v. *Gibbs*, 909 F.2d 1452 (CAFC) (en banc), *cert. denied*, 498 U.S. 811 (1990) 33, 34, 35
Castro v. *United States*, 540 U.S. 375 (2003) 17
Clinton v. *City of New York*, 524 U.S. 417 (1998) 35
Conley v. *Gibson*, 355 U.S. 41 (1957) 17
Cooper Indus., Inc. v. *Availl Services, Inc.*, 125 S.Ct. 577 (2004) 28
Corr. Serv. Corp. v. *Malesko*, 534 U.S. 61 (2001) 20
Cort v. *Ash*, 422 U.S. 66 (1975) 15
Crowell v. *Benson*, 285 U.S. 22 (1932) 23
Davis v. *Passman*, 442 U.S. 228 (1979) 15, 16, 18, 19, 20
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Estelle v. *Gamble*, 429 U.S. 97 (1976) 17
FDIC v. *Meyer*, 510 U.S. 471 (1994) 20, 29
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Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002) 45
Gonzales v. *Raich*, 125 S.Ct. 2195 (2005) 19
Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) 35
Haines v. *Kerner*, 404 U.S. 519 (1972) 17
Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) 35
I.N.S. v. *St. Cyr*, 533 U.S. 289 (2001) 23
Inhabitants of Montclair Tp. v. *Ramsdell*, 107 U.S. 147 (1883) 28
Jenkins v. *Morton*, 148 F.3d 257 (CA3 1998) 29-30
Johanns v. *Livestock Mktg. Ass'n*, 125 S.Ct. 2055 (2005) 19
Johnson v. *California*, 125 S.Ct. 1141 (2005) 41

Johnson v. *Robison*, 415 U.S. 361 (1974) 23, 25
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Mitchell v. *Maurer*, 293 U.S. 237 (1934) 19
Mudge v. *United States*, 308 F.3d 1220 (CAFC 2002) 12, 27, 28, 35
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Rizzitelli v. *FLRA*, 212 F.3d 710 (CA2 2000) 5
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United States v. *Armstrong*, 517 U.S. 456 (1996) 17
United States v. *Fausto*, 484 U.S. 439 (1988) 15-16, 26-27, 37, 39
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Webster v. *Doe*, 486 U.S. 592 (1988) 23, 24
Wilder v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) 29

Statutes

2 U.S.C. 1361(d)(1) 30
3 U.S.C. 435(d)(1) 30
5 U.S.C. 701(a)(1) 21, 45
5 U.S.C. 702 ..... 13, 15, 18, 33, 45
5 U.S.C. 1211 4
5 U.S.C. 1214(a)(3) 5
5 U.S.C. 1214(a)(2)(B) 31
5 U.S.C. 1214(b)(2)(E) 30
5 U.S.C. 2301(b)(2) 5
5 U.S.C. 2302(a)(2)(A) 4
5 U.S.C. 2302(b) 4, 5
5 U.S.C. 2302(b)(1) 4, 31
5 U.S.C. 2302(b)(7) 4
5 U.S.C. 2302(b)(8) 5, 38
5 U.S.C. 2302(b)(12) 4, 5
5 U.S.C. 4303 32
5 U.S.C. 7101 ..... 2, *passim*

5 U.S.C. 7103(a)(9)(A) 6
5 U.S.C. 7105(a)(2)(G) 5
5 U.S.C. 7116(a) 5, 9, 38, 40
5 U.S.C. 7118 7
5 U.S.C. 7121 ..... 2, *passim*
5 U.S.C. 7121(a) ..... 6, *passim*
5 U.S.C. 7121(a)(1) ..... 6, *passim*
5 U.S.C. 7121(a)(2) 6
5 U.S.C. 7121(d) 6, 31
5 U.S.C. 7121(e) 6, 31
5 U.S.C. 7121(f) 7, 27, 40
5 U.S.C. 7121(g) 6, 32
5 U.S.C. 7121(g)(3) 32
5 U.S.C. 7122(a) 7
5 U.S.C. 7123(a) 6
5 U.S.C. 7123(a)(1) 7, 40
5 U.S.C. 7512 32
5 U.S.C. 7703 ..... 5, 27, 43
5 U.S.C. 7703(a)(1) 3, 37
5 U.S.C. 7703(b)(1) 3
7 U.S.C. 136w-8(g)(2)(B) 45
7 U.S.C. 2021(g)(2)(C) 30
8 U.S.C. 1160(e)(1) 30
12 U.S.C. 1831k(d) 45
15 U.S.C. 6765(b) 42
19 U.S.C. 1339 45-46
22 U.S.C. 6723(b)(3)(B) 24-25
28 U.S.C. 1254(1) 1
28 U.S.C. 1331 ..... 13, 15, 18, 20, 33, 44, 45
31 U.S.C. 3552(b)(2) 30-31
31 U.S.C. 5111(c)(3) 46
31 U.S.C. 6716(a) 42

38 U.S.C. 511 25
40 U.S.C. 3312(a)(2) 31
42 U.S.C. 1395m(l)(5) 31
42 U.S.C. 1769f(f) 42
42 U.S.C. 1973b(b) 25
42 U.S.C. 1997e(a) 42
49 U.S.C. 5331(d)(8) 10
49 U.S.C. 40122(g)(1) 2
49 U.S.C. 40122(g)(2) 2, 5
49 U.S.C. 40122(g)(2)(A) 5, 38
49 U.S.C. 40122(g)(2)(C) 6
49 U.S.C. 40122(g)(3) 3
49 U.S.C. 40122(h) 4
49 U.S.C. 40122(j) 3, 37
49 U.S.C. 45102(b)(1) 7
49 U.S.C. 45104(8) 7, 10, 13, 18, 44

Regulations

5 C.F.R. Pt. 1201 3
5 C.F.R. 2423.41 6
49 CFR 40.23(a) 36
49 CFR 40.23(c) 36

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DOT Order 3910.1 7-8
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United States Office of Special Counsel: Prohibited Personnel Practices, *available at* http://www.osc.gov/ppp.htm#q2 5

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BRIEF OF THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-11a) is published at 382 F.3d 938. The district court's order granting the government's motion to dismiss the complaint and the amended and supplemental complaint for lack of subject matter jurisdiction (Pet. App. 12a-15a), dated February 25, 2003, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. The court of appeals denied rehearing and rehearing en banc on November 24, 2004. See Pet. App. 16a. The petition for a writ of certiorari was filed on February 22, 2005, and was granted on June 27, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to this Brief reproduces the relevant portions of the First and Fourth Amendments to the Constitution of the United States, as well as the relevant provisions in Titles 5 and 49 of the United States Code.

STATEMENT

This Court has long affirmed its "established practice * * * to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). This Court exercised precisely that jurisdiction in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), where it considered the constitutionality of the Customs Service's warrantless, suspicionless drug testing program. Despite the fact that petitioner, like the plaintiffs in *Von Raab*, is a federal employee seeking injunctive relief

against an allegedly unconstitutional drug testing program, the Ninth Circuit held that federal courts lack subject-matter jurisdiction to consider his claim in light of the Civil Service Reform Act (CSRA), 5 U.S.C. 7101 *et seq*. The court of appeals relied in particular on 5 U.S.C. 7121(a), which requires that a collective bargaining agreement "provide procedures for the settlement of grievances," and describes those negotiated procedures (with exceptions not relevant here) as "the exclusive administrative procedures for resolving grievances." That conclusion thus presents this Court with the question whether section 7121 or the CSRA more generally strips the federal courts of their pre-existing authority to adjudicate claims for equitable relief from violations of federal employees' constitutional and statutory rights.

I. Statutory Framework

Petitioner Terry L. Whitman is an Air Traffic Assistant for the Federal Aviation Administration (FAA). The FAA is an agency within the United States Department of Transportation (DOT). Like all federal agencies, the FAA faces certain constitutional and statutory constraints on its prerogatives as an employer. Unlike most federal agencies, however, the FAA is not directly governed by the CSRA. Congress has directed the FAA to develop its own personnel management system, 49 U.S.C. 40122(g)(1), and has provided that "[t]he provisions of title 5," which is where the CSRA is codified, "shall not apply to the new personnel management system," with certain exceptions. *Id.* § 40122(g)(2).[1]

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[1] The list of CSRA provisions that directly govern the FAA's Personnel Management System is codified in 49 U.S.C. 40122(g)(2).

In promulgating the FAA System, the Administrator noted his discretion to adopt the substance of any provision of title 5 that he deems appropriate. See FAA Personnel Management System – Introduction, http://www.faa.gov/ahr/policy/PMS/pmsintro.htm (visited Aug. 28, 2005).

Pursuant to this legislation, the FAA developed a personnel system (FAA System). See FAA Personnel Management System (Mar. 28, 1996), http://www.faa.gov/ahr/policy/PMS/personel.htm (visited Aug. 28, 2005). That system incorporates the provisions of the CSRA required under the enabling legislation, as well as additional CSRA provisions the FAA Administrator deemed appropriate for the FAA. *Id.* at II.

Under the FAA System, as under the CSRA, several administrative remedies are potentially available to a tenured competitive service employee who wishes to contest a management action taken against him. These include the following:

1. The Merit Systems Protection Board (MSPB) has jurisdiction over appeals from FAA decisions that involve "major adverse personnel actions." See 49 U.S.C. 40122(g)(3), (h).[2] The MSPB's procedures provide for an initial hearing before an administrative law judge, whose decision becomes a final order of the Board unless the Board grants a petition for Board review and issues a superseding order. See generally 5 C.F.R. Pt. 1201. "Any employee * * * adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision" in the Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(a)(1), (b)(1).

2. The Guaranteed Fair Treatment Program (GFT), like the MSPB process, is available to challenge "major adverse

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[2] 49 U.S.C. 40122(j) provides that "the term 'major adverse personnel action' means a suspension of more than 14 days, a reduction in pay or grade, a removal for conduct or performance, a nondisciplinary removal, a furlough of 30 days or less (but not including placement in a nonpay status as the result of a lapse of appropriations or an enactment by Congress), or a reduction in force action."

personnel actions" and operates as an alternative to MSPB review. See 49 U.S.C. 40122(h); *Battle* v. *FAA*, 393 F.3d 1330, 1332-33 (CADC 2005). GFT is an FAA-specific arbitration process for employees who, unlike petitioner, are not covered by collective bargaining agreements. See FAA Personnel Reform Implementation Bulletin 017 § 101 (Apr. 1, 1996), http://www.faa.gov/ahr/policy/prib/PRIBS/national/PRIB017.cfm (visited Aug. 28, 2005). Decisions of the arbitration panel are "issued as final orders of the Administrator" and an employee "may seek judicial review of an order by filing a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals for the circuit in which the employee resides." See FAA Personnel Management System at 5(m).

3. The Office of Special Counsel (OSC), see 5 U.S.C. 1211, has jurisdiction over the claim of an FAA employee that he has been subjected to any "personnel action"[3] – a broader category than the "major" adverse personnel actions to which the MSPB and GFT processes apply – but only if the employee's claim relates to "whistleblowing."[4] OSC's

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[3] The FAA System does not contain a definition of the phrase "personnel action." The definition in 5 U.S.C. 2302(a)(2)(A) includes, among other things, appointment, promotion, disciplinary action (including removal or suspension), or "a decision to order psychiatric testing or examination," *id.* § 2302(a)(2)(A)(x).

[4] For most federal employees, the OSC can assert jurisdiction over complaints about any of the twelve prohibited personnel practices described in 5 U.S.C. 2302(b). Section 2302(b) contains the CSRA's general definition of forbidden employment practices. Its twelve subsections prohibit actions such as violations of various federal fair employment and labor statutes, *id.* § 2302(b)(1); nepotism, *id.* § 2302(b)(7); and any other personnel action that "violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title," *id.* § 2302(b)(12). In turn, the merit

decisions not to prosecute complaints are not subject to any further review; an FAA employee who does not receive relief from the OSC process for his whistleblowing claim can, however, seek relief from the MSPB, see 5 U.S.C. 1214(a)(3), and ultimately from the Court of Appeals for the Federal Circuit, see 5 U.S.C. 7703.

4. The Federal Labor Relations Authority (FLRA) has original jurisdiction over a relatively limited class of complaints: charges that the FAA, or the employee's union, has committed an "unfair labor practice" within the meaning of 5 U.S.C. 7116(a), which deals with employees' rights concerning collective bargaining, labor organizing, union representation, and related issues. See *id.* § 7105(a)(2)(G). An employee begins the FLRA administrative process by filing a charge with an FLRA regional office. If, after investigation, the director of the regional office issues a complaint (or the general counsel of the FLRA orders that a complaint be issued, on appeal from the director's refusal to issue one), the complaint will proceed before an administrative law judge and culminate in a final FLRA order. See 5 C.F.R. 2423.41. "Any person aggrieved" by that final order can seek judicial review in either the D.C. Circuit or the court of appeals for the circuit where he resides. 5 U.S.C. 7123(a).[5]

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system principles articulated in section 2301 include ensuring that all employees "receive fair and equitable treatment in all aspects of personnel management * * * with proper regard for their privacy and constitutional rights." *Id.* § 2301(b)(2).

With respect to FAA employees, however, the OSC's jurisdiction is limited to whistleblowing claims. See United States Office of Special Counsel: Prohibited Personnel Practices, http://www.osc.gov/ppp.htm#q2 (visited Aug. 28, 2005).

[5] A decision by the FLRA not to issue a complaint is not judicially reviewable. See, *e.g.*, *Rizzitelli* v. *FLRA*, 212 F.3d 710, 712 (CA2 2000); *Turgeon* v. *FLRA*, 677 F.2d 937, 938 (CADC 1982) (per curiam).

5. Finally, FAA employees who are members of bargaining units also have access to negotiated grievance procedures.[6] The category of potential "grievances" is larger than the class of personnel actions: "grievance" means any complaint "by any employee concerning any matter relating to the employment of the employee." 5 U.S.C. 7103(a)(9)(A). However, collective bargaining agreements can exclude designated matters from the negotiated grievance procedures. 5 U.S.C. 7121(a)(2). With certain exceptions not relevant to this case, the negotiated grievance procedures are "the exclusive administrative procedures for resolving grievances" that fall within their scope. *Id.* § 7121(a)(1).[7]

The negotiated grievance procedure relevant to this case was the product of a collective bargaining agreement between the FAA and the National Association of Government Employees, SEIU/AFL-CIO (NAGE). See J.A. 20. That agreement covers FAA Air Traffic Assistants such as petitioner. The FAA-NAGE agreement permits individual employees to initiate the grievance procedure. At the first stage, the employee discusses the grievance with his immediate supervisor; if no satisfactory settlement is reached, the employee must send a written grievance to the Facility Manager (or his designee), describing the issues involved and the corrective or remedial action sought. Within a relatively

[6] See 49 U.S.C. 40122(g)(2)(C) (requiring the FAA System to incorporate chapter 71 of title 5); 5 U.S.C. 7121(a)(1) (providing that "any collective bargaining agreement shall provide procedures for the settlement of grievances").

[7] An employee can elect alternative administrative procedures – such as pursuing his claim before the MSPB – in cases involving alleged violations of specified federal fair employment statutes, discrimination on the basis of marital status or political affiliation, or the imposition of certain severe consequences such as removal, suspension, or reduction in grade. See 5 U.S.C. 7121(a)(1), (d), (e), and (g).

short time period, the manager or his designee will meet with the employee to attempt a resolution. See J.A. 23-24.

If the grievance is not resolved through this informal process, the CSRA entitles an employee to seek further review only by persuading his union to request arbitration. See J.A. 26. If he cannot, the CSRA provides no further administrative review – and no judicial review – of the Facility Manager's determination. If the union does request arbitration, the FAA or the union may file exceptions to the arbiter's decision with the FLRA. See 5 U.S.C. 7122(a). But unless the grievance involves an unfair labor practice within the meaning of 5 U.S.C. 7118 or a major adverse personnel action, neither the union (in the former case) nor the employee (in the latter) may seek judicial review of the arbitration. See 5 U.S.C. 7121(f), 7123(a)(1).

II. The FAA's Drug Testing Program.

Congress has directed the FAA to establish programs for "reasonable suspicion, random, and post-accident testing" for the use of controlled substances or alcohol by "employees of the Administration whose duties include responsibility for safety-sensitive functions," 49 U.S.C. 45102(b)(1), a category that includes petitioner. The operation of that program is subject to constitutional and statutory constraints. In *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), this Court held that the federal government's power to impose mandatory drug testing on federal employees is limited by the reasonableness requirement of the Fourth Amendment. Consistent with this constitutional requirement, Congress required the FAA to "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." 49 U.S.C. 45104(8).

The DOT has promulgated detailed regulations regarding random drug testing that apply to the FAA, among other agencies. Pet. App. 2a. Under DOT Order 3910.1, "random

testing" is listed as one of five categories of drug tests given to employees. The procedures for selecting employees for random testing are outlined in the DOT's testing guide, Department of Transportation Drug and Alcohol Testing Guide, http://dothr.ost.dot.gov/HR_Programs/Drug_and_Alcohol/revisedguide.pdf (visited Aug. 28, 2005). Five days before each test administration, the DOT's Departmental Drug Office is supposed to produce a computer-generated list, see, *id.*, app. B, at 7-9, 13-14, divided by geographic region, *id.* at II-1, of FAA employees to be tested. The list is given to the Drug Program Coordinator, the contractor, and on test day, the Site Coordinator. *Id.* at II-1.

Each Site Coordinator is charged with the responsibility of "work[ing] the list" – that is, proceeding through the list sequentially, summoning test subjects in the same order that the names appear. *Id.*, app. B at 11. If the first employee listed is scheduled to work during the designated collection time, the Site Coordinator will notify the employee's supervisor, who will notify the employee. *Id.* Typically, the employee will have fifteen to thirty minutes to report for testing. If the employee is unavailable for testing, the Site Coordinator notes this on the test list, *id.* at II-3, and proceeds to the next name on the list, *id.*, app. B at 11. This process continues until the predetermined number of tests for that day is finished or the day's list is exhausted. *Id.*, app. B at 3, 7, 9, 14, 16. The Test Guide does not contemplate rescheduling of random tests unless an employee is at work but fails to report to the test site, *id.* at VII-1, or proceeds to the site but is unable or unwilling to produce an adequate testing sample, *id.* at VII-2. The only other delineated rescheduling of test dates involves "follow-up" tests for employees who have previously tested positive for prohibited substances and are required to undergo additional testing. *Id.* at VII-3.

III. Proceedings Below

1. Petitioner Terry Whitman has worked as an Air Traffic Assistant at the FAA's Anchorage Air Route Traffic

Control Center for the past twenty years. As alleged in his complaint, between 1996 and 2002, petitioner was subjected to a pattern of non-random, suspicionless drug testing in violation of his constitutional and statutory rights. Petitioner alleged that during those six years, he was summoned from his work and subjected to breathalyzer or urinalysis examinations fourteen separate times, far more than similarly-situated co-workers. J.A. 7. According to petitioner's complaint, systematic deviations from FAA drug testing policies caused him to be selected "from an 'alternate list' to replace employees already selected for testing," *ibid.*; subjected "to a 'makeup test' for a previously conducted round of random drug testing," *id.* at 13; and repeatedly tested without allowing access to his bargaining unit representative, *id.* at 10. This pattern persisted even though petitioner tested negative for prohibited substances on every occasion.

In June 2001, convinced that he was being subjected to unconstitutional, illegal, non-random drug testing, petitioner filed a charge with the FLRA. See *supra* at 5 (describing the FLRA process). He alleged that the testing system failed to "guarantee individual rights" and was not random. C.A. S.E.R. 1; Pet. App. 3a. The San Francisco Regional Director of the FLRA refused to issue a complaint in the matter. He determined that petitioner's charge fell outside "the jurisdiction of the FLRA" because it did not involve an "unfair labor practice." C.A. S.E.R. 3 (citing 5 U.S.C. 7116(a)). The Director advised petitioner to raise his claim under the negotiated grievance procedure. *Ibid.* He did not identify any administrative process that explicitly provided a possibility of judicial review of the administrative decision. Petitioner filed a motion for reconsideration with the FLRA General Counsel, who denied the motion. *Id.* at 5.

2. Following the denial of his request for reconsideration, petitioner filed this suit against the Department of Transportation and Norman Y. Mineta, the Secretary of Transportation, in the U.S. District Court for the District of Alaska. In his *pro se* complaint and his amended

and supplemental complaint, petitioner alleged that the FAA had violated his "First Amendment right to privacy," J.A. 19, and the statutory requirement that its testing program "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." *Id.* at 7.[8] Petitioner sought only equitable relief. He requested that the court order an employee survey to determine whether the Anchorage Center's testing procedures complied with legal requirements and a temporary injunction against the FAA's testing of him if the survey indicated that test subjects were not chosen randomly.

The district court granted the government's motion to dismiss the complaint for lack of subject matter jurisdiction. Pet. App. 12a. The centerpiece of the district court's ruling was its conclusion that petitioner's ability to seek judicial redress depended on whether the CSRA provided him that right. See Pet. App. 14a (stating that federal courts have "no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere") (quoting *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984)). In particular, with respect to petitioner's constitutional claims, the district court held that the CSRA pre-empted all pre-existing causes of action "for constitutional violations arising from governmental personnel actions." Pet. App. 14a n.19 (quoting *Russell* v. *United States Dep't of the Army*, 191 F.3d 1016, 1020 (CA9 1999)). The district court found that since the CSRA contemplated negotiated grievance procedures, the "[c]ourt cannot provide him with a judicial remedy." Pet. App. 14a.

3. On appeal, the Ninth Circuit affirmed the district court's dismissal of the complaint "because 5 U.S.C. § 7121(a)(1), as amended in 1994, does not expressly confer

[8] Petitioner inadvertently cited 49 U.S.C. 5331(d)(8) when the correct citation is 49 U.S.C. 45104(8). But the language of the two provisions is the same.

federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements." Pet. App. 2a.[9]

The court of appeals began its analysis by observing that petitioner could have resorted to the negotiated grievance process, since his claim undoubtedly constituted a "grievance" within the meaning of the CSRA. Pet. App. 5a.[10] As to the question whether petitioner could "also pursue his employment-related claims in federal court," *id.* 6a, the court of appeals looked to 5 U.S.C. 7121(a)(1), which provides that with certain inapplicable exceptions, the negotiated grievance process "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." The court held that "'under the law of this circuit, 5 U.S.C. § 7121(a)(1) preempts employment related claims which fall within collective bargaining agreements' because the statute does not expressly provide for federal court jurisdiction over such claims." *Id.* at 7a (quoting *Golt* v. *United States*, 186 F.3d 1158, 1159 (CA9 1999).

[9] The court of appeals recognized that the district court had erroneously analyzed petitioner's claim directly under the CSRA rather than the FAA Personnel Management System, but found that the same legal analysis would apply. See Pet. App. 4a-5a.

[10] In addressing petitioner's claim that the FAA's actions also constituted a prohibited personnel practice, the court of appeals suggested that petitioner was "required under the CSRA to pursue corrective action through the Office of Special Counsel." Pet. App. 10a. It rejected petitioner's claim that he "was unable to pursue such relief because the FAA is immune from OSC investigation," finding that "his argument is belied by 49 U.S.C. § 40122(g)(2)(H), which extends the CSRA's provisions for OSC investigation of prohibited personnel practices to the FAA System." Pet. App. 10a. But see *supra* at 4 & n. 4 (explaining that, as the OSC confirms, its jurisdiction over FAA employees extends only to whistleblower complaints).

The court of appeals recognized that the Federal Circuit and the Eleventh Circuit had held to the contrary. Those circuits had each relied on a 1994 amendment to section 7121(a) that substituted the phrase "exclusive administrative remedy" for the antecedent phrase "exclusive remedy" to conclude that "[t]he plain language of amended § 7121(a)(1) * * * does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress." *Mudge* v. *United States*, 308 F.3d 1220 (CAFC 2002). See *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Comm'n*, 329 F.3d 1235, 1240 (CA11 2003). According to the Ninth Circuit, however, "the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction," and thus the amended section 7121(a)(1) "establishe[d] no more than an exclusive administrative remedy," but no judicial remedy. Pet. App. 8a.

Petitioner's motions for rehearing and rehearing en banc were denied. Petitioner filed a petition for a writ of certiorari on February 22, 2005. This Court granted the petition on June 27, 2005.

SUMMARY OF ARGUMENT

The fundamental error at the heart of the Ninth Circuit's decision was its assumption that because the CSRA generally and 5 U.S.C. 7121 do not themselves "expressly provide for federal court jurisdiction," Pet. App. 7a, Congress stripped the district courts of jurisdiction to hear petitioner's constitutional and statutory challenges to the FAA's drug testing policy. But it does not follow from the fact that section 7121 did not *create* jurisdiction that Congress somehow *stripped* the district court of the jurisdiction it would otherwise undoubtedly have enjoyed. Especially given this Court's consistent presumption against construing statutes to strip federal courts of their jurisdiction to hear constitutional claims for injunctive relief, such as petitioner's, nothing in the

text, structure and policy, or history of section 7121 can support so radical a conclusion.

The source of the district court's power to hear petitioner's claim lay entirely outside section 7121 and the CSRA. Petitioner's causes of action against the FAA and Secretary Mineta were conferred directly by the Constitution itself and by statutory provisions requiring the FAA to use nondiscriminatory and impartial drug-testing procedures and providing for judicial review of agency action. 49 U.S.C. 45104(8); 5 U.S.C. 702. The district court had subject-matter jurisdiction over those claims under 28 U.S.C. 1331; the Administrative Procedure Act waived any jurisdictional defense of sovereign immunity with respect to petitioner's claims against the agency. Finally, with respect to the redressability of petitioner's complaint, this Court has consistently recognized the power of federal courts to grant injunctive relief against unconstitutional conduct by the federal government.

Neither section 7121 nor the CSRA more generally stripped the district court of this preexisting jurisdiction. First, the plain language of section 7121(a) recognizes the existence, and continued vitality, of *non*-administrative procedures; thus, it should be read only to preclude federal employees from seeking redress through administrative paths other than the negotiated grievance procedures, and not to impliedly repeal otherwise available judicial remedies.

Second, the 1994 amendment to section 7121(a) that added the word "administrative" to the phrase "exclusive procedures" reinforces the plain-language meaning. The amendment was enacted against a backdrop of decisions that had construed the phrase "exclusive procedures" to include judicial procedures as well as administrative ones. Congress' decision to amend the statute to refer instead only to "exclusive administrative procedures" removed the bar to judicial redress. Had Congress agreed with the construction of section 7121(a) adopted by the Ninth Circuit, there would

have been no need to amend the section at all – let alone to amend it by using language that is most naturally read to leave judicial remedies available and that had indeed been proposed specifically as a means of restoring federal employees' right to seek judicial review.

Third, the overall structure of the CSRA undercuts the Ninth Circuit's interpretation. The CSRA as a whole clearly does not preclude judicial review of constitutional or statutory challenges to federal drug-testing regimes. The sole result of the Ninth Circuit's position is to leave employees like petitioner – sober and compliant – unable to bring their constitutional challenges, while substance-impaired or insubordinate co-workers retain their right to judicial review. It is implausible that Congress intended this paradoxical and unfair result, particularly in light of this Court's holding in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), that individuals can challenge an agency's rules without first disobeying them and then raising their challenges as a defense in an enforcement proceeding. Not only does the CSRA not preclude judicial review, it does not require employees to pursue, or to exhaust, negotiated grievance procedures when they seek solely prospective injunctive relief.

ARGUMENT

I. Federal District Courts Presumptively Have Jurisdiction Over Suits, Such as Petitioner's, That Seek Equitable Relief for Constitutional Claims.

The court of appeals' decision in this case rests on a fundamental legal error: the assumption that petitioner's invocation of federal jurisdiction must rest on 5 U.S.C. 7121(a). The court of appeals' conclusion that section 7121(a) does not *itself* confer jurisdiction on federal district courts to hear constitutional or statutory claims by federal employees is beside the point, because section 7121(a) is not a jurisdictional provision at all. Instead, it simply sets out a

requirement that federal collective bargaining agreements must contain negotiated grievance procedures and describes the relationship between those grievance procedures and the other administrative remedies available to federal employees.

The source of the federal district court's power to hear petitioner's complaint is entirely extrinsic to section 7121(a). It lies in the Constitution itself, in 28 U.S.C. 1331, and in section 702 of the Administrative Procedure Act, 5 U.S.C. 702. As this Court explained in *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979), the question whether a plaintiff can bring suit claiming unconstitutional conduct by the government involves three subsidiary issues: cause of action; jurisdiction; and relief. Under this Court's precedents, petitioner plainly has a cause of action; the federal district court manifestly had jurisdiction; and injunctive relief clearly was available.

1. *Cause of action.* In *Davis*, this Court highlighted the sharp distinction between cases involving "[s]tatutory rights and obligations" on the one hand and constitutional commands on the other. *Davis*, 442 U.S. at 241. With respect to the former, the question whether an individual has a cause of action is wholly a question of congressional intent. Congress both creates the right or obligation and decides whether to permit its vindication through private lawsuits. See *Cort* v. *Ash*, 422 U.S. 66 (1975); see also, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-89 (2001). *United States* v. *Fausto*, 484 U.S. 439 (1988), for example, involved the very narrow question whether untenured federal employees not protected by a veterans' preference should be permitted to bring claims alleging violations of agency regulations in the context of an adverse personnel action. See *id.* at 440. The question whether Fausto had a cause of action was purely one of congressional intent. This Court concluded from the CSRA's structure and purpose that Congress did not intend to permit employees in Fausto's position to have a cause of action under the Back Pay Act when the CSRA itself denied

that category of employees "the right to administrative or judicial review of suspension for misconduct." *Id.* at 443.

By contrast, in suits presenting constitutional claims, the question whether a particular individual has a cause of action does not depend on congressional intent.[11] "At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' * * * * litigants who allege that their own constitutional rights have been violated" have a cause of action. *Davis*, 442 U.S. at 242 (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). In explaining this principle, the Court pointed to *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), where the court "settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." *Davis*, 442 U.S. at 242. On that basis, this Court has repeatedly recognized a cause of action for individuals, like petitioner, asserting Fourth Amendment violations by federal officials. See, *e.g.*, *Bell* v. *Hood*, 327 U.S. 678, 681-82 (1946) (holding that plaintiffs who allege a violation of their Fourth and Fifth Amendment rights by federal agents have stated a cause of action).

In this case, petitioner has a constitutional cause of action. Among other things, petitioner's pleadings alleged that the FAA's drug-testing policy, as administered at the Anchorage Air Route Traffic Control Center, was "not random," J.A. 11, that he had been "selectively target[ed]" for testing as a result of his initial complaint, J.A. 18, and that the testing had violated his "right to privacy under the Constitution," J.A. 19.

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[11] By contrast, questions of jurisdiction and remedy do at least implicate congressional intent. See *infra* at 18-21.

Read fairly,[12] these allegations raise constitutional claims under the Fourth, Fifth, and First Amendments to the Constitution. Indeed, in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), this Court adjudicated nearly identical claims against the Customs Service's drug testing regime without any suggestion that the Court's authority to do so was in doubt. The Court's decision in that case established that a government drug testing program must not be "subject 'to the discretion of the official in the field,'" *id.* at 667 (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)), and must avoid "the grave potential for 'arbitrary and oppressive interference with the privacy and personal security of individuals' that the Fourth Amendment was designed to prevent," *id.* at 672 n.2 (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). Petitioner's complaint alleges that the FAA's testing at the Anchorage Facility violated these principles. Because the testing was allegedly arbitrary rather than random – *i.e.*, because it depended on individual discretion – the complaint also states a claim for a violation of the equal protection component of the Fifth Amendment's Due Process Clause. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (noting that decisions to prosecute cannot be based on "arbitrary" classifications). And to the extent that petitioner alleged in his supplemental complaint that he had been tested in part because he had complained of irregularities in the testing

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[12] This Court has repeatedly held that pleadings filed by *pro se* litigants like petitioner are to be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam); see also, *e.g.*, *Castro* v. *United States*, 540 U.S. 375, 381 (2003) (noting that federal courts "sometimes will ignore the legal label[s]" used by *pro se* litigants in order to avoid unfairness); *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (a *pro se* complaint should be dismissed for failure to state a claim only "if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'") (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)).

program, his complaint is fairly construed to raise a First Amendment retaliation claim as well. While the district court may ultimately determine that these claims are unfounded, there can be no question that petitioner has a cause of action to seek that judicial determination.[13]

2. *Jurisdiction.* Nor is there any question that the district court had subject-matter jurisdiction to hear petitioner's constitutional claims. Under 28 U.S.C. 1331, federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Davis* held that when a plaintiff has a cause of action arising under the Constitution, section 1331 gives federal district courts subject-matter jurisdiction over a suit for injunctive relief against a government official (here, Secretary Mineta). 442 U.S. at 236-37.

Section 702 of the Administrative Procedure Act, in turn, removes any obstacle to the district court exercising jurisdiction against the Department of Transportation. That provision expressly waives the federal government's sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702. In light of section 702, this Court has consistently held that section 1331 "confer[s] jurisdiction on federal courts to review agency action." *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977).

Thus, for example, the employees in *Von Raab* relied on 28 U.S.C. 1331, the Declaratory Judgment Act, and the

[13] Petitioner postpones to Section III, *infra*, the question whether he also has a cause of action under 49 U.S.C. 45104(8), which requires that the Administrator of the FAA "ensure that employees are selected for [drug and alcohol] tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances."

Administrative Procedure Act as the source of the federal courts' jurisdiction to hear their request for injunctive relief against the Customs Service's drug-testing regime. See Joint Appendix at 4, *National Treasury Employees Union* v. *Von Raab*, No 86-1879. This Court never questioned its jurisdiction to consider the employees' claims, although the issue of subject-matter jurisdiction had been litigated before the district court. See *National Treasury Employees Union* v. *Von Raab*, 649 F.Supp. 380, 384-85 (E.D. La. 1986) (squarely rejecting the government's argument that the CSRA barred district court review).[14]

3. *Relief.* As this Court explained in *Davis*, "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." 442 U.S. at 239. "[R]elief is a question of the various remedies a federal court may make available." *Id.* at 239 n.18 (emphasis omitted).

Throughout our history, this Court has "sustain[ed] the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell* v. *Hood*, 327 U.S. at 684; *Davis*, 442 U.S. at 242. The *United States Reports* are filled with cases involving suits for equitable relief against federal officials – in the last two Terms alone, see, *e.g.*, *Gonzales* v. *Raich*, 125 S.Ct. 2195 (2005); *Johanns* v. *Livestock Mktg. Ass'n*, 125 S.Ct. 2055 (2005); *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004). Petitioner's

[14] That the Court never expressed concern about the jurisdictional question is particularly telling in light of its repeated recognition of a "special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)); see also, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997).

complaint sought only the equitable relief that it has been this Court's "established practice" to find available under the inherent powers of the federal courts. *Davis*, 442 U.S. at 242 (quoting *Bell*, 327 U.S. at 684).

Importantly, this case does *not* involve a claim for damages, which raises distinct and more difficult remedial questions. Since its decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395 (1971), this Court has repeatedly faced the question whether to recognize an implied right of action for damages caused by constitutional violations to supplement the established right to injunctive relief. See, *e.g.*, *Corr. Serv. Corp.* v. *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979). For the most part – and particularly with regard to employment-related claims by federal employees – this Court has refused to find the right to a damages action. See *Malesko*, 534 U.S. at 68-70.

But as this Court explained in *Malesko*, the refusal to permit a *Bivens* action in no way undercuts the continued availability of the injunctive relief sought by petitioner here: "[U]nlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.* at 74. See also *Bush* v. *Lucas*, 462 U.S. at 385 (explaining that federal employees are protected by "procedures – administrative *and judicial* – by which improper action may be redressed" and it is thus unnecessary to create a damages action as well) (emphasis added).

In sum, contrary to the court of appeals' belief in this case, it is entirely irrelevant that section 7121(a) "does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements," Pet. App. 2a, since 28 U.S.C. 1331 clearly does. Moreover, there

is no doubt that petitioner has a cause of action to pursue his constitutional claims for injunctive relief and that the district court had jurisdiction to award that remedy. Rather, the question is whether section 7121(a), *sub silentio*, removes from federal district courts the jurisdiction they would otherwise undeniably possess. As petitioner explains in the next sections, it does not.

II. Nothing About Section 7121 Strips the Federal Courts of Their Jurisdiction to Hear Petitioner's Constitutional Claims.

By its plain terms, section 7121(a) has nothing to do with the question whether federal employees can seek judicial redress for constitutional violations. Rather, it simply requires that collective bargaining agreements contain grievance procedures and describes the role that those negotiated procedures should play vis-à-vis other potential administrative procedures. Given the plain language of section 7121(a), the strong presumption against reading *any* statute to preclude judicial review of constitutional claims, and the history surrounding the 1994 amendment that introduced the word "administrative" into the phrase "exclusive administrative procedures," this Court should hold that federal district courts retain their power to review claims like petitioner's.

A. This Case Is Governed By the Strong Presumption – Which This Court Has *Never* Found Overcome – That Federal Statutes Do Not Preclude All Judicial Review of Constitutional Claims.

Nothing in section 7121(a) even mentions the jurisdiction of the federal courts, let alone purports to limit it in any way. That is significant in light of the Administrative Procedure Act's declaration that agency actions are judicially reviewable except where "statutes preclude judicial review." See 5 U.S.C. 701(a)(1). As we now explain, this presumption in

favor of judicial review, particularly as applied to constitutional claims, has not been overcome here.

This Court has frequently expressed a "strong presumption" in favor of the availability of judicial review of executive-branch action. *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (quoting *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975)). That presumption is especially strong in cases raising constitutional claims because denying individuals judicial review of such claims would raise a "serious constitutional question" given the judiciary's central role in protecting constitutional rights. See *Michigan Acad.*, 476 U.S. at 681 n.12 ("Congress cannot bar all remedies for enforcing federal constitutional rights") (quoting Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 921, n.113 (1984)). That stripping federal courts of the power to hear a constitutional question would, at the very least, raise serious constitutional questions has been widely and consistently recognized in the academic literature. See, *e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1398-99 (1953) (identifying potential constitutional problems with Congress' enactment of statutes implicitly limiting federal courts' power to hear a given class of constitutional cases); Lawrence Gene Sager, *Constitutional Limits on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 69-72 (1981) (discussing constitutional difficulties that would arise if Congress attempted to strip federal courts of their power to hear particular constitutional claims); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1553-54 (2000) (explaining the history of the controversy surrounding jurisdiction-stripping); Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*,

9 Lewis & Clark L. Rev. 363, 369-70 (2005) (providing an up-to-date summary of the literature). This Court has sought to avoid this constitutional difficulty by repeatedly requiring that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Demore* v. *Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster* v. *Doe*, 486 U.S. 592, 603 (1988)); see also *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974).

In light of the strong presumption against jurisdiction stripping, this Court requires that as long as "an alternative interpretation of the statute" that preserves the jurisdiction of federal courts over constitutional claims "is 'fairly possible,'" courts are "obligated" to adopt that interpretation. *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)). This obligation obtains even where the constitutionally problematic interpretation might be "otherwise acceptable," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), and "plausible," *Public Citizen* v. *Dep't of Justice*, 491 U.S. 440, 467 (1989). See also *St. Cyr*, 533 U.S. at 299-300. The jurisdiction-preserving construction will be adopted unless it is "plainly contrary" to congressional intent. *Edward J. DeBartolo Corp.*, 485 U.S. at 575. Thus, this Court has required a "heightened showing," *Webster*, 486 U.S. at 603, through "specific language or specific legislative history that is a reliable indicator of congressional intent," or specific congressional intent "fairly discernible in the detail of the legislative scheme." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984) (internal quotations omitted).

The importance of this presumption, and its strength, are demonstrated by the fact that, as far as petitioner is aware, this Court has *never* construed any statute to surmount the presumption and bar all judicial review of a constitutional claim. The court of appeals' decision in this case, which completely foreclosed judicial review of petitioner's

constitutional claims in *any* court[15] is thus completely unprecedented.

In light of these principles, nothing about section 7121(a) justifies construing it as a jurisdiction-stripping statute.

1. The text of section 7121(a) contains no specific language precluding judicial review. As far as petitioner is aware, no bill precluding judicial review of an individual's constitutional claims has been enacted since the end of the Civil War. But bills have frequently (albeit unsuccessfully) been introduced to achieve that result, and their language stands in sharp contrast to the text of section 7121(a). See, *e.g.*, Pledge Protection Act of 2005, H.R. 2389, 109th Cong., 1st Sess. § 2 (2005) (providing that " no court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance * * * or its recitation"); Sanctity of Life Act of 2005, H.R. 776, 109th Cong., 1st Sess. §§ 3, 4 (2005) (providing, *inter alia*, that the Supreme Court and federal district courts "shall not have jurisdiction" over any case "arising out of any statute, ordinance, rule, regulation, practice, or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any statute, ordinance, rule, regulation, or practice" that "prohibits, limits, or regulates * * * the performance of abortions").

Moreover, even with respect to *statutory* claims, Congress has demonstrated that when it wants to foreclose judicial review of administrative decisions, it expresses this intent explicitly. See, *e.g.*, 22 U.S.C. 6723(b)(3)(B) (providing that the President's decision to object to an individual's serving as an inspector under the Chemical

[15] There is no contention that federal employees could pursue their employment claims in state court with possible review by this Court on certiorari.

Weapons Convention "shall not be reviewable in any court"); 42 U.S.C. 1973b(b) (providing that the determination that a particular jurisdiction is covered by the special provisions of the Voting Rights Act "shall not be reviewable in any court"). Another example is the statute at issue in *Johnson* v. *Robison*, 415 U.S. 361 (1974), which provided that "no other official or any court of the United States shall have power or jurisdiction to review any * * * decision" by the Administrator of the Veterans' Administration regarding any law providing benefits. 38 U.S.C. 211(a) (currently codified in 38 U.S.C. 511). Notably, even in *Robison*, this Court declined to find that the statute stripped federal courts of jurisdiction over *constitutional* (as opposed to statutory or regulation-based) claims.[16] Nothing in the language of section 7121(a) thus comes even close to "purport[ing]" to strip courts of their preexisting jurisdiction. *Verizon Maryland, Inc.* v. *Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 643 (2002).

2. Nor does anything in the text of the CSRA or the statute's overall structure overcome the presumption that the federal courts have jurisdiction over constitutional claims. There is no indication in the statute that Congress believed judicial review of employee claims to be generally incompatible with the civil service system it was establishing. To the contrary, the CSRA explicitly provides for judicial review of a vast array of employment-related claims – any claim, in fact, involving a major adverse personnel action or various forms of discrimination that are also actionable under federal fair-employment statutes. See *supra* at 3-4. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court found it unnecessary to create an implied damages cause of action for constitutional claims precisely because the CSRA provides "procedures – administrative *and judicial* – by which

[16] Petitioner addresses the reviewability of his statutory claim *infra* at 44-46.

improper action may be redressed." *Id.* at 385 (emphasis added).[17]

Nor is there any reason to believe that because Congress expressly provided for administrative proceedings culminating in judicial review of *some* employee claims, it intended to foreclose judicial review of all others, including particularly the constitutional claims that have uniformly been the province of the federal courts. For example, as petitioner explains below, *infra* at 36-37, the CSRA explicitly provides for judicial review of constitutional claims regarding drug testing by employees who are subjected to serious disciplinary action because they refuse to take, or they fail, drug or alcohol tests. Thus, it permits judicial review of claims by those who test positive. But this Court has repeatedly explained that an express provision of judicial review for some types of claims does not carry with it a negative pregnant "suffic[ient] to support an implication of exclusion as to others [from judicial review]." *Michigan Acad.*, 476 U.S. at 674 (quoting *Abbott Labs* v. *Gardner*, 387 U.S. 136, 141 (1967)). Rather, "silence on the subject leaves the jurisdictional grant of § 1331 untouched." *Verizon*, 535 U.S. at 644.

Nothing in this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988), undercuts this conclusion. In *Fausto*, this Court held that an untenured federal employee could not seek judicial review of his wholly statutory claim for reinstatement and backpay when such employees were specifically excluded from the provisions of the CSRA that provide judicial review for claims of other classes of employees. Nothing in *Fausto* purported to establish that all

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[17] Although much of the CSRA can be read as a jurisdiction-*channeling* statute, in the sense that some provisions require exhaustion of administrative remedies, see *infra* at 43, and others confer jurisdiction on particular federal courts in circumstances not present here, see *supra* at 3-5, that is a far cry from any conclusion that the CSRA was intended to foreclose judicial review altogether.

federal employee claims are pervasively precluded from judicial review unless the CSRA explicitly provides otherwise. Instead, the Court found review precluded in *Fausto* principally because Congress had carefully considered and precisely delineated the rights of workers who were neither part of the competitive, tenured civil service nor entitled to a veterans' preference, with respect to the specific type of action involved – a suspension based on misconduct. *Id.* at 448-50. Their statutorily unprotected status, as well as the text, structure, and legislative history of the CSRA, showed that Congress had deliberately excluded them from the judicial review contemplated by the CSRA. *Ibid.* By contrast, because Fausto raised no constitutional claim, the Court did not suggest that the CSRA manifested any intent to strip the federal courts of their jurisdiction to protect constitutional rights.

3. The Ninth Circuit's reading of section 7121(a) undoubtedly creates a serious constitutional question because it completely forecloses judicial review of petitioner's First, Fourth, and Fifth Amendment claims – thus "remov[ing] from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and depriv[ing] an individual of an independent forum for the adjudication of a claim of constitutional right." *Bartlett* v. *Bowen*, 816 F.2d 695, 703 (CADC 1987). By contrast, the construction adopted by the Federal Circuit in *Mudge* v. *United States*, 308 F.3d 1220 (2002), and by the Eleventh Circuit in *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Commission*, 329 F.3d 1235 (2003), wisely avoided that constitutional difficulty. As petitioner explains below, the text, structure and legislative history of section 7121(a) all show that it is not just "fairly possible," but is in fact a great deal more plausible, to construe section 7121(a) to preserve judicial review of petitioner's constitutional claims.

B. The Plain Language of Section 7121 Makes Clear Congress' Intent Only To Channel Administrative Complaints and Not To Foreclose Judicial Remedies.

Section 7121 expressly provides that, with a few exceptions, the negotiated grievance procedures established by a collective bargaining agreement "shall be the exclusive administrative procedures for resolving grievances" which fall within the agreement's coverage. Because the most natural construction of the phrase "exclusive administrative procedures" is one that recognizes the existence, and continued vitality, of *non*-administrative procedures, section 7121 should be read to mean what it says, precluding federal employees from seeking redress through *administrative* paths other than the negotiated grievance procedures (such as the other grievance procedures an agency maintains or the grievance procedures provided by the Office of Personnel Management, see *Mudge*, 308 F.3d at 1231; *ASEDAC*, 329 F.3d at 1240), while leaving otherwise available *judicial* remedies unaffected.

It is a "settled rule that [the Court] must, if possible, construe a statute to give every word some operative effect." *Cooper Indus., Inc.* v. *Aviall Services, Inc.*, 125 S.Ct. 577, 584 (2004). Adherence to this rule requires that section 7121 be construed to give meaning to the word "administrative." The Ninth Circuit's approach, however, rendered the word entirely superfluous by treating the negotiated grievance procedures as if they were the sole avenue – administrative or not – for seeking redress. The court below thus flouted this Court's consistent directive that statutes must be interpreted so that "no clause, sentence, or word shall be superfluous," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citing *Washington Mkt. Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879); see also, *e.g.*, *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 698 (1995); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Tp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883)).

1. In construing section 7121, this Court should give the word "administrative" its ordinary or natural meaning. *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). That meaning – as dictionary usage, the decisions of this Court, and the United States Code all reflect – squarely distinguishes "administrative functions or acts * * * from such as are judicial." Black's Law Dictionary 45 (6th ed. 1990). Indeed, Black's expressly defines an "administrative remedy" as "a *nonjudicial* remedy provided by an administrative agency." *Id.* at 1320 (emphasis added).[18] Thus, when section 7121 addresses "administrative procedures for resolving grievances," it refers to the processes conducted by an administrative agency, and not to any *judicial* procedures.

This Court has regularly acknowledged the distinction between "administrative" and "judicial" proceedings. See, *e.g.*, *Ranchos Palos Verdes* v. *Abrams*, 125 S.Ct. 1453, 1459 (2005) (explaining that 42 U.S.C. 1983 provides a cause of action for violation of a federal statute by persons acting under color of state law, when the substantive statute "[does] not provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated"); *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997) (noting that the title of the Social Security Act at issue "contains no private remedy – *either judicial or administrative*") (emphasis added); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990) (noting that the Medicaid Act provided no provision "for private *judicial or administrative* enforcement") (emphasis added). See also *Jenkins* v. *Morton*, 148 F.3d 257, 259 (CA3 1998) (holding

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[18] Black's consistently treats "administrative" and "judicial" as distinct categories. See, *e.g.*, BLACK'S LAW DICTIONARY 738 (8th ed. 2004) (defining a "fair hearing" as a "judicial *or* administrative hearing conducted in accordance with due process") (emphasis added); *id.* at 379 (defining "county court" as a body that "may govern administrative *or* judicial matters, depending on state law") (emphasis added).

that the provision of the Prison Litigation Reform Act that requires prisoners to exhaust their "administrative remedies" before bringing suit in federal court does not also require them to seek judicial relief from the state since there is a "well-established distinction between administrative and judicial remedies").

2. If Congress had intended section 7121(a) to address both administrative and judicial proceedings, it would not have included the "administrative" limitation or it would have mentioned both classes of procedures, as it plainly has in other provisions of the CSRA. See, *e.g.*, 5 U.S.C. 1214(b)(2)(E) (providing that a determination by the Special Counsel "shall not be cited or referred to in any proceeding under this paragraph or any other *administrative or judicial* proceeding for any purpose") (emphasis added); *id.* § 1214(a)(2)(B) (providing that certain written statements "may not be admissible as evidence in any *judicial or administrative proceeding*") (emphasis added).

The CSRA reflects Congress' consistent practice in drafting statutes. The United States Code is honeycombed with statutory provisions that expressly include the phrase "administrative or judicial" when Congress intends to restrict access to both administrative and judicial fora. See, *e.g.*, 2 U.S.C. 1361(d)(1) (limiting the right of legislative branch employees to "commence an administrative or judicial proceeding to seek a remedy" for violation of certain employment rights); 3 U.S.C. 435(d)(1) (similarly limiting the ability of certain employees in the office of the president to "commence an administrative or judicial proceeding to seek a remedy" for violation of certain federal employment laws); 7 U.S.C. 2021(g)(2)(C) (providing that certain food stamp-related disqualification decisions made by the Secretary of Agriculture "shall not be subject to judicial or administrative review"); 8 U.S.C. 1160(e)(1) (restricting "administrative or judicial review" of determinations of special agricultural workers' status); 31 U.S.C. 3552(b)(2) (providing that certain government procurement-related decisions are "not subject to

administrative or judicial review"); 40 U.S.C. 3312(a)(2) (providing that certain General Services Administration decisions to waive compliance with building codes are "not subject to administrative or judicial review"); 42 U.S.C. 1395m(l)(5) (providing that "[t]here shall be no administrative or judicial review" of the amounts set in the fee schedule for Medicare-covered ambulance services).

There is, therefore, no basis for reading the word "administrative" out of Section 7121(a) or redrafting the statute to include the word "judicial" where Congress left it out. See *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920) ("It is elementary that all of the words used in a legislative act are to be given force and meaning, and of course the qualifying words * * * cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect.").

3. The syntax of the sentence in which the phrase "exclusive administrative procedures" appears also reinforces the conclusion that section 7121(a)'s plain language operates only to restrict sources of "administrative" redress. The sentence begins with the clause "[e]xcept as provided in subsections (d), (e), and (g) of this section." Each of those subsections provides employees with alternative administrative routes – before the Merit Systems Protection Board, the Equal Opportunity Employment Commission, or the Office of Special Counsel – for pursuing employment-related grievances.[19] In light of this exceptions clause, the

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[19] Subsection 7121(d) offers employees alleging a violation of 5 U.S.C. 2302(b)(1) – which forbids various forms of discrimination – the ability to "raise the matter under a statutory procedure or the negotiated procedure." Subsection 7121(e) permits employees who have been subjected to certain severe consequences – such as removal or reduction in grade pursuant to 5 U.S.C. 4303 or removal, lengthy suspension or furlough, or reduction in grade or pay pursuant to 5 U.S.C. 7512 – the

most natural reading of section 7121(a) is that it cuts off access to those alternative administrative remedies except in the circumstances specified. The plain language of section 7121 thus bears on the availability or unavailability of administrative procedures, not on judicial review.

C. The History of Section 7121 Reinforces the Conclusion That Congress Did Not Strip the Courts of the Power To Resolve Constitutional Claims.

As originally enacted, section 7121(a) used the phrase "exclusive procedures" without the qualifying adjective "administrative." Civil Service Reform Act of 1978, Pub. L. 95-454 Title VII, § 7121, 92 Stat. 1111 (1978). But in 1994, section 7121(a) was amended so that it now refers to "exclusive administrative procedures." Pub. L. 103-424, § 9(c), 108 Stat. 4361 (1994). The events leading up to that amendment are particularly persuasive in reinforcing the conclusion that section 7121(a) is not a jurisdiction-stripping provision.

The court of appeals accorded Congress' surgical insertion of "administrative" no significance whatsoever, adhering to its pre-amendment interpretation in *Veit* v. *Heckler*, 746 F.2d 508 (CA9 1984), and proceeding on the assumption that "administrative" was added to clarify that section 7121(a) did not "constitute an express grant of federal court jurisdiction" over employee grievances. Pet. App. 10a. As petitioner has already explained, however, section 7121(a)

"discretion" to raise their claims "either under the appellate procedures" of the Merit Systems Protection Board "or under the negotiated grievance procedure." 5 U.S.C. 7121(e)(1). And subsection 7121(g) sets out in further detail the consequences of an employee's decision to "elect" among three "remedies": appeal to the Merit Systems Protection Board; pursuit of a negotiated grievance procedure; or resort to the Office of Special Counsel. 5 U.S.C. 7121(g)(3).

was *never* the source for federal court jurisdiction over employees' claims; that jurisdiction always rested on the general grant of federal question jurisdiction contained in 28 U.S.C. 1331 and the waiver of immunity contained in section 702 of the Administrative Procedure Act. See *supra* at 18-20. It was thus entirely unnecessary to confirm that it did not *confer* federal court jurisdiction.

To the contrary, the only reason why Congress would have wanted to amend section 7121(a) was to override the views of several federal courts that the provision as previously worded *rescinded* federal court jurisdiction conferred elsewhere. Prior to the amendment, the leading decision construing section 7121(a), *Carter* v. *Gibbs*, 909 F.2d 1452 (CAFC) (en banc), *cert. denied*, 498 U.S. 811 (1990), had interpreted section 7121(a)'s then-reference to the "exclusive procedures" of the negotiated grievance process to preclude judicial review of grievable claims. The *Carter* approach was widely adopted by other federal courts. See, *e.g.*, *Albright* v. *United States*, 26 Cl. Ct. 1119, 1122 (1992); *Saul* v. *United States*, 928 F.2d 829, 843 n.23 (CA9 1991); *O'Connell* v. *Hove*, 22 F.3d 463, 466-67 (CA2 1994); see also *Matter of Cecil E. Riggs, et al.*, 71 Comp. Gen. 374, 375 (1992).

The year before section 7121(a) was amended – and, crucially, against the backdrop of *Carter* – a bill was introduced at the urging of employee representatives proposing that section 7121(a) be amended in *precisely* the manner ultimately accomplished in 1994: that is, by inserting the word "administrative" between the words "exclusive" and "procedures." The accompanying House Committee Report explained that section 7121 was never "intended to limit *judicial* remedies otherwise provided by law." Federal Employee Fairness Act of 1994, H.R. Rep. No. 103-599, pt. 2, at 75 (1994) (emphasis added). Adding "administrative" to section 7121(a), the Report explained, would "clarif[y] Congress' original intent that the grievance procedure would be an exclusive administrative procedure for matters that it

covers* * * * This clarification is necessary to correct an erroneous decision [in *Carter*.]" *Id.* pt. 1, at 56. The original bill to correct *Carter* was not enacted, but the next year, identical language was proposed in new legislation. At the subcommittee hearings on that bill, officials from the National Treasury Employees Union asked Congress to overrule *Carter* by amending section 7121(a) to make clear that the statute would not prevent the federal courts from adjudicating claims brought by federal employees covered by a collective bargaining agreement.[20] This time, the bill passed, and Section 7121(a) was amended to its present form.

This Court has consistently construed statutes in light of "the common-sense presumption that statutes are usually enacted to change existing law." *Wallace* v. *Jaffree*, 472 U.S. 38, 59 n.48 (1985). Had Congress agreed with *Carter*'s construction of section 7121(a), there would have been no need to amend section 7121(a) at all – let alone to amend it by using language that is most naturally read to accomplish precisely the opposite result. Congress also would have understood that using the same phraseology that had previously been proposed to overrule *Carter* would convey an intent to reject *Carter*'s jurisdiction-stripping construction. It is thus highly implausible that, without explanation, Congress added the word "administrative" to section 7121(a) to accomplish a completely unexpressed purpose when the natural consequence of the language it chose was to restore jurisdiction to the federal courts.[21]

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[20] See H.R. 2970, To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv., 103d Cong. 20-23 (1993) (statements of Timothy Hannapel, Assistant Counsel, National Treasury Employees Union, and Robert M. Tobias, President, National Treasury Employees Union).

[21] That the alteration of section 7121 was denominated a "Technical and Conforming" amendment does not undermine this

Given the plain meaning of section 7121's reference to "exclusive administrative" procedures, only an "extraordinary showing" of a contrary legislative history could justify construing section 7121 to restrict access to judicial remedies. *Mudge*, 308 F. 3d at 1230, citing *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). In this case, however, every piece of available history reinforces section 7121's plain meaning and supports the continued availability of judicial review.

D. The Court of Appeals' Construction of Section 7121 Would Produce Absurd and Unjust Results That Congress Could Not Have Intended.

One "common mandate of statutory construction" is "to avoid absurd results." *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). See also, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). But the court of appeals' construction of section 7121(a) as a jurisdiction-stripping statute would produce strikingly unjust and absurd results. First, it would deprive petitioner – who complied with every demand that he submit to drug or alcohol testing and passed each test – of the right to seek judicial review, while leaving such review available for individuals who were the subjects of adverse agency action because they refused to take tests at all or who failed the tests they took. Second, it would permit third parties, in this case the FAA and

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common-sense conclusion. As this Court noted in *United States* v. *R.L.C.*, 503 U.S. 291, 305 n.5 (1992), "a statute is a statute, whatever its label": even if the "critical congressional enactment" is contained within a "Technical Amendments Act," courts should "appl[y] the usual tools of statutory construction" to give the statute its "most natural[] read[ing]." See also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (rejecting the argument that a phrase lacked meaning simply because it was added in a "Technical and Conforming Amendment" and directing that the phrase "must be construed to mean exactly what it says").

petitioner's union, to prospectively waive his right to judicial redress.

If the FAA demands that an employee take a drug or alcohol test, there are three possible outcomes. First, the employee can refuse to take the test. Second, the employee can submit to the test and test positive for a prohibited substance. Third, the employee can submit to the test and test negative for a prohibited substance. In any of these scenarios, the employee may wish, as petitioner did, to challenge the test on constitutional or statutory grounds. But because the Ninth Circuit's construction of section 7121 would allow such a challenge only under first or second scenarios, it rests on the perverse and implausible conclusion that Congress intended to place someone in the third category – the obedient but innocent employee – in a disfavored position.

For FAA employees, "[r]efusal to submit to random drug or alcohol testing or failure to cooperate with the collection process * * * is grounds for removal from the Federal service." Memorandum from the Department of Transportation, Federal Aviation Administration, Notice to Applicant or Employee Subject to Drug and/or Alcohol Testing 3 (Sept. 27, 2000), http://www.faa.gov/region/aso/hrmd/EOD/Drug%20Test%20NOTICE%20MEMO.DOC (visited August 29, 2005). Similarly, failing a test will result in removal from safety-sensitive positions, see 49 CFR 40.23(a), (c); reassignment to a non-safety, non-security position, if one is available; and ultimately termination unless the employee completes agency-approved rehabilitation. Memorandum from the Department of Transportation, Federal Aviation Administration, Notice to Applicant or Employee Subject to Drug and/or Alcohol Testing.

If an FAA employee were terminated (or subject to a suspension of more than 14 days or reduced in grade or pay) for refusing to submit to a test or for failing a test, he would be entitled to appeal this "major adverse personnel action," see 49 U.S.C. 40122(j), to the Merit Systems Protection

Board. And if the Board rejected his constitutional and statutory challenges to the testing regime, he would be entitled to judicial review pursuant to 5 U.S.C. 7703(a)(1).

In contrast, under the Ninth Circuit's reading of section 7121(a), an FAA employee like petitioner, who falls into the third category – that is, an employee who complies with the demand for testing and passes the test – is wholly precluded from ever challenging the testing regime in federal court. He cannot allege that the test itself is a major adverse action. See *supra* note 2. Nor can he file a complaint with the Office of Special Counsel alleging a prohibited personnel practice. See *supra* note 5. Thus, the Ninth Circuit's reading of section 7121(a) leaves an FAA employee like petitioner – sober and compliant – unable to challenge the constitutionality of a substance testing regime,[22] while his insubordinate or impaired co-workers retain their right to judicial review. It is implausible to believe that Congress intended this paradoxical and unfair result, which is yet a further basis for rejecting the Ninth Circuit's reading in favor of the plain-language interpretation adopted by the other courts of appeals to have addressed the issue.

That the Ninth Circuit's decision turns the remedial structure of the CSRA "upside down," *Fausto*, 484 U.S. at 449, is illustrated by the numerous substantial constitutional and statutory claims of FAA employees that would have no possibility – ever – of receiving judicial review. An FAA employee, for example, who was repeatedly subjected to strip searches, would have no judicial recourse; in and of themselves, the searches, however frequent or invasive, would almost certainly not constitute a major adverse personnel action under 49 U.S.C. 40122(j), an unfair labor practice under 5 U.S.C. 7116(a), a whistleblower claim under

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[22] At most, the sober and compliant employee could file a grievance, which his union might or might not pursue to arbitration and which would be subject to final review by the FLRA, a specialized agency with no expertise in Fourth Amendment law.

5 U.S.C. 2302(b)(8), see 49 U.S.C. 40122(g)(2)(A), nor any other category of claim for which the CSRA itself provides judicial review. The same would be true for an employee who was subject to repeated week-long suspensions or harassment because of his political beliefs.

The disfavored position into which the Ninth Circuit's reading thrusts employees like petitioner is not only intuitively perverse, but inconsistent with the principles this Court articulated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). In *Abbott Laboratories*, the court of appeals had held that the plaintiff drug manufacturers could not seek pre-enforcement judicial review of the Food and Drug Administration's promulgation of new regulations. Thus, the plaintiffs faced the prospect of either complying with regulations that they believed exceeded the FDA's power or risking criminal and civil penalties for unlawfully distributing "misbranded" pharmaceuticals. Under the court of appeals' view, only by risking serious penalties and raising the invalidity of the regulations as a defense to an enforcement action would they be able to present their claims to a federal court. This Court, however, held that the plaintiffs were entitled to seek judicial review without facing such a Hobson's choice:

> To require [the manufacturers] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where * * * a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

Abbott Labs, 387 U.S. at 153.

The Ninth Circuit's ruling places petitioner squarely into the *Abbott Laboratories* dilemma. His hands are effectively tied; he must either submit to tests he believes are unconstitutional and unauthorized by law or risk his job by declining to take the test in order to raise his constitutional and statutory claims as a defense in a termination proceeding. Particularly given the availability of a reasonable, plain-language interpretation of section 7121(a) that preserves petitioner's right to judicial review of his constitutional claims, there is no warrant for finding an implied "statutory bar" in this case. Foreclosing the possibility of judicial challenges to drug testing for employees who submit to testing and receive clean results creates an anomalous consequence antithetical to the logic, plain language, and history of section 7121.

The Ninth Circuit's reading of section 7121(a) produces yet another absurd result: it allows the union to waive petitioner's right to judicial review of his constitutional claims against his wishes.[23] Thus, under the Ninth Circuit's view, an employee is forced by a collective bargaining agreement into pursuing his claim through the agreement's negotiated process, but that process effectively assigns the employee's right to seek judicial review of his constitutional claims to his union.

That outcome conflicts with this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that collective bargaining agreements, while they can waive causes of action based on contractual terms and causes of action related to collective activity, *cannot* waive employees' rights to seek judicial redress for statutory claims.

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[23] Only the union or the employer, and not the employee, can decide to invoke the final stage of the grievance process – arbitration. J.A. 26. Only the union or the employer, and not the employee, can seek judicial review in the limited circumstances in which such review is available – namely, when the grievance involves an unfair labor practice.

Gardner-Denver concerned an employee's race discrimination claim under Title VII; the defendant argued that an employee who pursued arbitration under a collective bargaining agreement could not then bring suit in federal court. This Court disagreed:

> It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. * * * * Of necessity, the rights conferred can form no part of the collective-bargaining process * * * . In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Id. at 51-52. *Gardner-Denver*'s analysis has, if anything, even more force in cases involving constitutional claims. Neither the FAA nor petitioner's union has any power to waive prospectively his right to seek judicial review.

E. This Court Should Not Require Plaintiffs Like Petitioner to Exhaust Negotiated Grievance Procedures Before Seeking Judicial Review.

Petitioner recognizes that one court of appeals has read exhaustion requirements into certain provisions of the CSRA. See *Weaver* v. *United States Info. Agency*, 87 F.3d 1429 (CADC 1996) (requiring an employee to exhaust his remedies with the OSC regarding an oral admonishment before filing suit), *cert. denied*, 520 U.S. 1251 (1997); *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963 (CADC 1990) (requiring employees alleging a

breach of the duty of fair representation to exhaust their remedies with the FLRA before filing suit on their related constitutional claims).[24] Whether petitioner was required to exhaust his claims is not a question before this Court: the Ninth Circuit did not dismiss petitioner's claims for failure to exhaust and, in any event, the Government has waived any exhaustion defense by not raising it in the lower courts. Cf. *Johnson* v. *California*, 125 S.Ct. 1141,1159 (2005) (Thomas, J., dissenting) (noting that a majority of the Court seemed in the context of a constitutional challenge to prison policy to assume that even "statutorily mandated exhaustion is not jurisdictional" and that a defendant has "waived the issue by failing to raise it").

Were this Court to consider the question, however, it should hold that exhaustion is not required for claims, like petitioner's, for which the only administrative remedy is an informal grievance process. Nothing in the text of section 7121(a) explicitly requires employees to pursue the informal negotiated grievance process before filing suit. And nothing in the overall structure of the CSRA imposes a requirement that employees exhaust negotiated grievance procedures.

As this Court has recognized, "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy* v. *Board of Regents*, 457 U.S. 496, 513 (1982). Exhaustion requirements are thus "largely creatures of statute," *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000). Broadly speaking, when

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[24] In imposing an exhaustion requirement, however, the D.C. Circuit explicitly acknowledged the continued availability of judicial review. *Steadman*, 918 F.2d at 968 (declaring, after requiring that the employees first exhaust their administrative remedies, that this was "not to say that a federal employee may not bring an equitable claim based on the Constitution in federal district court after having exhausted his CSRA remedy" because "if a constitutional claim survives an unsuccessful journey through the administrative process, the federal courts are open").

Congress wishes to impose an exhaustion requirement, it takes one of two tacks. First, Congress often expressly requires exhaustion. See, *e.g.*, 15 U.S.C. 6765(b) (requiring that persons aggrieved by certain insurance regulatory actions "shall be required to exhaust all available administrative remedies" before they may "seek judicial review"); 31 U.S.C. 6716(a) (requiring that, "[b]efore bringing an action," any person who claims to be injured by a local government's failure to comply with conditions of various federal block grant programs must "exhaust administrative remedies"); 42 U.S.C. 1769f(f) (requiring that "[p]rior to seeking judicial review," any contractor barred from participating in federally funded child nutrition programs must "exhaust all administrative procedures"); 42 U.S.C. 1997e(a) (providing that "[n]o action shall be brought with respect to prison conditions under section 1983 * * * or any other Federal law * * * until such administrative remedies as are available are exhausted"). Section 7121(a) notably contains no exhaustion requirement. When Congress amended section 7121(a) in 1994 to reinstate district court jurisdiction to hear employees' constitutional claims, it could easily have also added an explicit exhaustion requirement; that it did not do so undercuts any assumption that it meant to impose one. Under these circumstances, it would affirmatively frustrate congressional intent to require exhaustion: Congress specified the role that it wanted the grievance procedure to play in relation to other possible remedies and made clear that existence of the procedure would have no effect on judicial causes of action.

Second, Congress sometimes implicitly requires exhaustion by setting up a detailed remedial scheme that provides for a particular form of judicial review preceded by administrative proceedings. When Congress constructs this type of specific system, this Court has sometimes inferred that Congress did not mean for plaintiffs to circumvent its particular provisions by relying on a more general statutory provision that allows for immediate resort to federal district

court. Cf. *Smith* v. *Robinson*, 468 U.S. 992 (1984) (holding that when Congress has created a detailed remedial scheme, plaintiffs cannot bring suit under 42 U.S.C. 1983 instead); *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers' Ass'n*, 453 U.S. 1 (1981) (same).

Some constitutional claims by federal employees might fall into this category. If, for example, an employee could have challenged a major adverse personnel action before the MSPB with review by the Federal Circuit, see 5 U.S.C. 7703, a court might conclude that Congress intended for that employee to pursue that administrative remedy rather than going straight to court. That is because Congress' design would be directly thwarted if an employee were permitted such direct judicial access. But for claims like petitioner's, where no sequential path is set out for administrative and then judicial review, the structure of the CSRA creates no implied exhaustion requirement.

In fact, the nature of the negotiated grievance process – in which the *union*, rather than the grievant, controls whether arbitration is even available, see J.A. 26 – shows why section 7121 cannot be sensibly read to impose an exhaustion requirement. An individual employee simply has no power of his own to fully exhaust the entire negotiated grievance procedure; control over the stages of the grievance procedure that *might* – albeit only in extraordinarily narrow circumstances not applicable to this case, see *supra* at 7 – result in the ability to seek judicial review lies in the union alone. Requiring an employee to exhaust a process he cannot pursue makes no sense.

Of course, most employees, especially those advised by counsel, will likely choose to pursue negotiated grievance procedures before they head to federal court: those processes are sure to be less expensive and quicker, and when they work, preferable along nearly every dimension. But nothing in the statute explicitly or implicitly requires them to do so.

Even if this Court were to adopt a judicially created exhaustion requirement, it should nevertheless reverse the judgment of the Ninth Circuit. First, even the D.C. Circuit has not imposed an exhaustion requirement on cases like petitioner's; it requires exhaustion only in cases seeking retrospective relief. See *Weaver*, 87 F.3d at 1434 (distinguishing between "the ordinary case of a failure to exhaust CSRA remedies, in which the employee would have no claim that she could file directly in federal court if isolated from her claims for relief from a personnel action" and claims where an employee wishes simply to challenge the prospective application of a policy, and permitting the latter type of claim without exhaustion). Thus, under the D.C. Circuit's rule, petitioner could have proceeded directly to federal district court, since he sought no form of retrospective relief. Second, the government did not argue before the district court that petitioner's complaint should be dismissed for failure to exhaust, thereby waiving that argument. Finally, the district court dismissed petitioner's complaint for lack of subject-matter jurisdiction – a dismissal with prejudice; if petitioner was required to exhaust and had failed to do so, any dismissal should have been without prejudice.

III. The District Court Also Retained Its Jurisdiction to Hear Petitioner's Statutory Claim.

In addition to raising a constitutional challenge to the way the FAA's drug-testing program had been administered, petitioner also argued that the agency had violated 49 U.S.C. 45104(8), which required the Administrator to "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." Just as the district court retained its jurisdiction under 28 U.S.C. 1331 and the Administrative Procedure Act to hear petitioner's constitutional claims, so too, it retained its jurisdiction to hear petitioner's statutory

claim, unless a statute precluded judicial review. 5 U.S.C. 701(a)(1).

To be sure, Congress often imposes duties on governmental actors without creating concomitant, judicially enforceable rights for every individual who is affected by the government's conduct. Cf. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002) (requiring that statutes contain "rights-creating" language before the Court will find that Congress intended to allow private enforcement). But here, section 45104(8)'s explicit focus on the privacy and fairness interests of individual employees surely creates a right. And section 702 of the APA explicitly gives individuals whose rights were denied by agency action an "entitle[ment] to judicial review."

As with petitioner's constitutional claim, the Ninth Circuit erred by assuming that section 7121 had to create a cause of action in order for petitioner to bring suit. To the contrary, petitioner's cause of action is provided by the combination of section 45104(8) and section 702 of the Administrative Procedure Act. And 28 U.S.C. 1331 gives the federal district court jurisdiction to hear petitioner's statutory cause of action because his claim arises under the laws of the United States. Nothing in the text, structure, purposes, or legislative history of section 45104(8) suggests that Congress meant to accord the Administrator unreviewable discretion in establishing or administering the substance-testing program. Certainly, if Congress had wanted to make the Administrator's decisions unreviewable, it had numerous examples of far clearer language in which to express itself. See, *e.g.*, 7 U.S.C. 136w-8(g)(2)(B) (providing, with the exception of one specific issue that was amenable to judicial review, that "[n]o other action authorized or required under this section shall be judicially reviewable by a Federal or State court"); 12 U.S.C. 1831k(d) (providing with respect to any federal banking agency's decision to pay a reward for assistance in proving civil or criminal violations of various federal statutes that "[a]ny agency decision under this section is final and not reviewable by any court"); 19 U.S.C. 1339

(providing, with respect to the Trade Remedy Assistance Office that "[a]n agency decision regarding whether a business concern is an eligible small business for purposes of this section is not reviewable by any other agency or by any court"); 31 U.S.C. 5111(c)(3) (providing, with respect to certain determinations by the Secretary of the Treasury regarding procurements related to coinage that "[a]ny determination * * * shall not be reviewable in any administrative proceeding or court of the United States").

The very fact that employees who fail a test – and thus face suspension, termination, and other adverse consequences – undeniably retain the right to seek judicial review of their punishment belies any contention that the operation of the drug-testing program was intended to be unreviewable. As petitioner explained *supra* at 38-39, this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), stands squarely for the proposition that plaintiffs are entitled to seek judicial review of agency action without having first to violate the agency's regulations. Having already been subjected to several substance tests that allegedly violated section 45104(8) and the FAA's own regulations, petitioner's claim was surely ripe within the meaning of *Abbott Laboratories*. Thus, he should have the same ability to seek judicial review of the FAA's actions that employees who refused to take, or who failed, the drug and alcohol tests would have enjoyed.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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September 1, 2005

APPENDIX

APPENDIX

Constitutional Provisions

The First Amendment to the Constitution of the United States provides, in relevant part that "Congress shall make no law * * * abridging the freedom of speech * * * ."

The Fourth Amendment to the Constitution of the United States provides, in relevant part that "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated * * * ."

Statutory Provisions

5 U.S.C. 7121(a) provides:

(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

49 U.S.C. 40122(g) provides, in relevant part:

(1) In general. In consultation with the employees of the [Federal Aviation] Administration and such non-governmental experts in personnel management systems as he may employ, and notwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement * * * a personnel management system for the Administration that addresses the unique demands on the

agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.

(2) Applicability of title 5. The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of –

(A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5;

* * *

(C) chapter 71, relating to labor-management relations;

* * *

(H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

49 U.S.C. 45102(b)(1) provides, in relevant part:

The Administrator shall establish a program of preemployment, reasonable suspicion, random, and post-accident testing for the use of a controlled substance in violation of law or a United States Government regulation for employees of the Administration whose duties include responsibility for safety-sensitive functions and shall establish a program of reasonable suspicion, random, and post-accident testing for the use of alcohol in violation of law or a United States Government regulation for such employees.

49 U.S.C. 45104 provides, in relevant part:

In carrying out section 45102 of this title, the Administrator of the Federal Aviation Administration shall develop requirements that —

* * *

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no

employee is harassed by being treated differently from other employees in similar circumstances.

FOR ARGUMENT

JK

Supreme Court, U.S.
FILED
SEP - 1 2005
OFFICE OF THE CLERK

No. 04-1131

IN THE

Supreme Court of the United States

Terry L. Whitman,

Petitioner,

v.

U.S. Department of Transportation, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari filed February 22, 2005

Certiorari granted June 27, 2005

TABLE OF CONTENTS

	Page
District Court Docket Sheet	1
Court of Appeals Docket Sheet	3
Complaint	6
Unopposed Motion to Amend and Supplement Complaint	12
Collective Bargaining Agreement (excerpts)	20

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
CIVIL DOCKET ENTRIES FOR CASE A02-0112—CV (RRB)
"TERRY L. WHITMAN V
U.S. DEPT OF TRANSPORTATION"

RELEVANT DOCKET ENTRIES

Document #	Filed	Docket Text
1-1	05/23/02	Complaint filed; Summons issued.
1-2	05/23/02	PLF 1 Jury Demand
4-1	08/19/02	DEF 1-2 Answer to Complaint.
11-1	10/21/02	PLF 1 Unopposed motion to amend complaint and to supplement complaint w/att exhs.
12-1	10/23/02	RBB Order granting unopposed motion to amend complaint and to supplement complaint (11-1). cc: cnsl.
13-1	01/10/03	DEF 1-2 motion to dismiss the complaint and the amended complaint w/att exhs.
14-1	01/27/03	PLF 1 opposition to DEF 1-2 motion to dismiss the complaint and the amended complaint (13-1) w/att exhs.
15-1	02/03/03	DEF 1-2 reply to opposition to DEF 1-2 motion to dismiss the complaint and the amended

Document #	Filed	Docket Text
		complaint (13-1).
16-1	02-26-03	RRB Order granting motion to dismiss the complaint and the amended complaint (13-1). cc: cnsl
17-1	02/27/03	RRB Judgment that this case is dismissed for lack of subject matter jurisdiction. cc: cnsl, O&J 11507
18-1	03/26/03	PLF 1 appeal to 9CCA of (17-1) filed 02/27/03. cc:T. Witman, cnsl, Judge Beistline, 9CCA

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
CIVIL DOCKET FOR CASE #: 03-35303

Whitman

v.

U.S. Dept. of Transpo, et al.

DOCKET ENTRIES

DATE	PROCEEDINGS
4/10/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL FOR APPELLEES AND APPELLANT IN PRO PER. CADS SENT (Y/N): N.
	setting schedule as follows: appellant's opening brief is due 5/20/03; appellees' brief is due 6/20/03; appellants' optional reply brief is due 14 days from service of the answering brief . [03-35303] (ld) [03-35303]
4/10/03	Filed certificate of record on appeal RT filed in DC n/a [03-35303] (ld) [03-35303]
5/23/03	Filed original & 15 copies Aplt Terry L. Whitman opening brief (Informal: y) 26 pages; served on 5/20/03 [03-35303] (gva) [03-35303]
7/29/03	Filed original & 15 copies Aples DOT, Norman Y. Mineta brief, 47 pages, 5 Supplemental Excs Exc.: served on 7/28/03 minor defcy: (Needs Statement of Related Cases). Notified counsel. (gva) [03-35303]

DATE	PROCEEDINGS
8/14/03	Filed original & 15 copies Terry L. Whitman reply brief (Informal: n) 5 pages; served on 8/10/03 [03-35303] (gva) [03-35303]
9/11/03	FILED CERTIFIED RECORD ON APPEAL: 1 CLERK'S RECORD. (ORIGINAL) [03-35303] (sd) [03-35303]
9/12/03	SUBMITTED TO SCREENING PANEL 351. (Written) [03-35303] [03-35303] (th) [03-35303]
3/5/04	Removed from screening calendar. [03-35303] [03-35303] (th) [03-35303]
5/3/04	CALENDARED: ANCHORAGE July 7, 2004 9:00 AM Courtroom 2, 2nd Floor [03-35303, 03-35838] (rei) [03-35303 03-35838]
6/24/04	Filed order (Deputy Clerk: hh) ... This case therefore shall be submitted on the briefs and record, without oral argument, on Wednesday 7/7/04, in Anchorage, Alaska. (phoned/faxed) [03-35303] (gva) [03-35303]
7/7/04	SUBMITTED ON THE BRIEFS TO: Cynthia H. HALL, Andrew J. KLEINFELD, Kim M. WARDLAW. [03-35303] (jmr) [03-35303]
8/30/04	FILED OPINION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Published. Cynthia H. HALL; Andrew J. KLEINFELD; Kim M. WARDLAW, author.) FILED AND ENTERED JUDGMENT. [03-35303] (ru) [03-35303]
10/12/04	[5204407] Filed original & 50 copies Appellant Terry L. Whitman's petition for panel rehearing and petition for rehearing en banc of 2 pages; served on 10/9/04 (PANEL AND ALL ACTIVE JUDGES & INTERESTED

DATE	PROCEEDINGS
	SENIOR JUDGES) [03-35303] (gva) [03-35303]
11/24/04	Filed order (Cynthia H. HALL, Andrew J. KLEINFELD, Kim M. WARDLAW) ... The petition for panel rehearing and the petition for rehearing en banc are DENIED. [5204407-1] [03-35303] (gva) [03-35303]
12/3/04	MANDATE ISSUED [03-35303] (gva) [03-35303]

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In Propria Persona Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TERRY L. WHITMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
UNITED STATES	)	
DEPARTMENT OF	)	**COMPLAINT**
TRANSPORTATION;	)	**AND**
THE HON. NORMAN Y.	)	**DEMAND FOR**
MINETA,	)	**JURY TRIAL**
U.S. Secretary of	)	
Transportation;	)	
	)	
Defendant.	)	

This complaint addresses a continuing violation of my rights as an employee of the Department of Transportation, Federal Aviation Administration (Agency), Anchorage Air Route Traffic Control Center located at 700 North Boniface Parkway, Anchorage, Alaska. Specifically, the violations of my rights involve misapplication of the Agency's random

substance testing program which have resulted in my being tested an inordinate number of times, my selection from an "alternate list" to replace employees already selected for testing, and in the denial of my rights to representation of my choosing while being tested.

By not administering substance testing randomly, the Agency has violated Title 49 U.S.C. Section 5331(d)(8), which states that the Secretary of Transportation shall develop requirements that shall "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances."

JURISDICTION

The United States District Court for the District of Alaska has jurisdiction over this dispute because the U.S. Department of Transportation is a party to this dispute involving discrimination in the workplace.

FACTS

On April 20, 2002 I was substance-tested for alcohol. The test was administered by A.J. Clark under the supervision of Malcolm Monds. The Agency Site Coordinator for that day was Robert Phillips. My selection for testing that day was the fourth time in a row and the fourteenth time overall since testing was instituted in 1987.

When Mr. Phillips notified me that I was selected for testing on April 20, he asked me if I wanted my facility bargaining unit representative present while I was being tested. I responded that I did not need the bargaining unit representative present, but I wanted Mr. Phillips to call her to notify her that I was being tested. Mr. Phillips went to the watch desk and placed a phone call. When Mr. Phillips returned, he told me that he was unable to reach the facility representative. I then asked Mr. Phillips if he would contact my work section

supervisor. Mr. Phillips again went to the watch desk and returned to tell me that he was unable to contact my supervisor. Mr. Phillips asked if he should try to contact the regional bargaining unit representative. I asked if he would, but again Mr. Phillips was unsuccessful in establishing contact. I submitted to the alcohol breathalyser without the knowledge of my bargaining unit representatives or my supervisor.

This experience was similar to the first time alcohol testing was conducted. On that occasion, the Site Coordinator was Joseph Rollins. After I reported to work for a day shift, Mr. Rollins notified me that I had been selected for testing and informed me that my regional bargaining unit representative had just gone home from a midnight shift and that my facility bargaining unit representative was not due in until the following shift which was a swing shift. Mr. Rollins ordered me to submit to the substance testing without representation of my choosing. I submitted to the testing under protest. My bargaining unit representatives were not informed of the substance testing until after the fact.

The third time I was substance-tested by urinalysis, I was told I was being selected from an "alternate list" to replace two employees who were being released to go home after they had already been selected and were awaiting testing. The testing technician that day was Malcom Monds and the Site Coordinator was John Turner. This third selection for testing was part of a string where I was selected for urinalysis testing the first seven times in a row.

INJURY

The substance testing performed by the Agency under Federal Aviation Administration Alaskan Region Flight Surgeon Robert W. Rigg, M.D. is not random. For example, the eleventh time I was substance tested was on March 28, 2000. While I was awaiting testing, two employees who have been at the facility since the inception of testing in 1987, each made the unsolicited comment that this was the first time they

had ever been selected for substance-testing. By my own informal methods, I have determined that the average number of substance-testing administered to similarly-situated employees is four (4).

On October 4, 2001, I was substance tested for the thirteenth time. When my test results were returned to me, the results were accompanied by a document dated October 7, 2001 prepared by Substance Abuse Program Manager Marge Cholometes. The title of the document was "MOST FREQUENTLY ASKED QUESTIONS" which addressed drug and alcohol testing.

In MOST FREQUENTLY ASKED QUESTIONS, Ms. Cholometes states that the collection goal for random test lists equates to one-third of covered employees and does not exceed 24. The expected value for being selected at random for any single instance of substance-testing is one chance in three. Then, for the first seven tests conducted at my workplace, the expected value for random selection would be two-and-one-third times. My selection for substance testing the first seven times in a row exceeds this expected value by three hundred-four per cent (304%). Put another way, the chance of my being selected for testing at random the first seven times in a row is one-third raised to the seventh power, or one chance in 2,187. The total number of tests conducted the first seven times was one hundred-sixty-eight (168). The odds against being tested seven times in a row exceeds the total number of tests conducted by one thousand-three hundred per cent (1,300%).

In MOST FREQUENTLY ASKED QUESTIONS, Ms. Cholometes also states "Due to the large number of covered employees in facilities such as centers, the test list is broken down into sub-lists of approximately 72 names each, resulting in multiple visits to some facilities. Further on, in answer to the question "Why is it that every time the collector shows up at my facility my name is on the so called random list?" Ms. Cholometes states "If you are in a safety or security related

position that has been identified as a 'testing designated position' (TDP) your name will be on the list."

These statements, whether taken separately or together, are evidence that the selection process is not random. In the former statement, sub-lists divided into thirds with multiple visits would guarantee that everyone who is eligible would be tested by the third visit. It would automatically prevent my being tested more than once in three visits. As stated above, I was tested the first seven times in a row, and most recently, I have been tested four times in a row. The latter statement indicates that everyone who is eligible is on the list. This is not a characteristic of a random selection process. It seems to guarantee that everyone at a facility such as an air route traffic control center where I work would be tested. However, these explanations fail to explain how two similarly-situated co-workers escaped testing for thirteen years while during the same period I was tested ten times.

Ms. Cholometes' explanations are contradicted by the U.S. Department of Transportation pamphlet (revised March 1989) entitled "DOT's Drug Program, Random Testing: How it Works." Under the heading "Random Testing" the pamphlet states "The identification of employees for random drug testing is accomplished using a computer draw from a single pool of all the employees who occupy safety or security sensitive positions." The pamphlet rebuts the notion that everyone is on the list, and does not authorize "sub-lists divided into thirds" or "alternate lists."

Therefore, the overall number of times I have been tested, the two periods where I have been selected repeatedly for testing, the denial of my rights to representation, the failure to inform my bargaining unit representatives when testing is being conducted, and my selection for testing from an "alternative list" are all related in that they represent a continuing violation of my rights as a federal employee and as an individual. This continuing violation is due to the Agency testing program where the selection process is not done on a sta-

tistically equal basis with respect to my duty location.

RELIEF

This court can provide injunctive relief by ordering a survey of similarly-situated employees to establish an average number of selections for substance-testing. If the number of times I have been tested exceeds the average by an amount that establishes by a preponderance of evidence that the testing is not random, the Court can order the Agency to remedy the situation by whatever means deemed appropriate, such as enjoining the Agency from subjecting me to any further substance-testing until the average number for similarly-situated employees reaches fourteen.

SIGNED,

TERRY L. WHITMAN
Plaintiff

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In Propria Persona Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TERRY L. WHITMAN,	)	
	)	
Plaintiff,	)	
	)	**Case No.**
	)	**A02-0112 CV**
vs.	)	**(RRB)**
	)	
UNITED STATES	)	**UNOPPOSED**
DEPARTMENT OF	)	**MOTION TO**
TRANSPORTATION; THE HON.	)	**AMEND**
NORMAN Y. MINETA, U.S.	)	**COMPLAINT**
Secretary of Transportation;	)	**AND**
	)	**UNOPPOSED**
	)	**MOTION TO**
	)	**SUPPLEMENT**
Defendant.	)	**COMPLAINT**

I, TERRY L. WHITMAN, Plaintiff proceeding pro se move that the Federal District Court allow Plaintiff to amend the COMPLAINT identified above pursuant to Federal Rules of Civil Procedure (FRCP) Rule 15(a) and to supplement the COMPLAINT pursuant to FRCP Rule 15(d). The Assistant U.S. At-

torney has agreed not to oppose the motion provided that the motion is filed on or before October 18, 2002.

MOTION TO AMEND COMPLAINT

Plaintiff moves to amend the cause of action for the COMPLAINT to Title 49, Subtitle VII, Part A, subpart iii, Chapter 451, Section 45104(8), as this deals more specifically with authority for, and rights under, aviation safety programs.

Plaintiff amends the COMPLAINT by adding the date October 30, 1996 as the date when Plaintiff was first subjected to an alcohol breathalyzer test. This supplements the claims made in the COMPLAINT under the heading FACTS, in the paragraph beginning on the last line of page 2 and continuing on page 3 of the COMPLAINT.

MOTION TO SUPPLEMENT COMPLAINT

Plaintiff moves to supplement the COMPLAINT due to recent events beginning with a drug-testing incident on September 25, 2002, that are related to, or likely grew out of the filing of the COMPLAINT. A description of the events is given below. The request for RELIEF remains the same as for the original COMPLAINT.

FACTS

Upon arriving at work at the Anchorage Air Route Traffic Control Center (Center) on the afternoon of September 25, 2002, I was ordered by Manager Harold Joseph Brown to report to the large conference room. My arrival at the large conference room was followed by the arrival of Assistant Air Traffic Manager Daria Gerlach, who was serving as Site Coordinator (SC), Drug Program Coordinator (DPC) Malcolm Monds, and contract technician Charlie Y. Gilman. I was informed by Mr. Monds that I was being subjected to a "makeup test" for a previously conducted round of random drug testing by urinalysis.

I challenged the legality of conducting a makeup test citing Title 49, United States Code (U.S.C.). I submitted to the urinalysis without receiving a satisfactory explanation justifying having a team show up at the Center to exclusively test me for random testing which supposedly took place on August 28, 2002.

The following morning, September 26, 2002,1 sent an e-mail to Alaskan Region Flight Surgeon Dr. Robert W. Rigg documenting what had occurred the night before.[1] To recapitulate, I related to Dr. Rigg that I was summoned for substance testing; that I did not receive a satisfactory explanation justifying the legality for the "makeup test"; that the technician who collected the urine specimen failed to properly seal the specimen bag and then advocated tampering with the serial numbers on the specimen bottles; that my request to produce another urine specimen within two hours was refused; and that the makeup test was not legally justified because the random test conducted on August 28, 2002 occurred on a midnight shift I was never scheduled to work.

The dates I cited in the September 26 e-mail to Dr. Rigg for when the random testing was said to have occurred were for the midnight shift that began at 11:00 PM on August 27, 2002, continuing until 7:00 AM on August 28, 2002. However, the correct dates for the testing at issue were for the midnight shift that began at 11:00 PM on August 28, 2002, ending at 7:00 AM on August 29, 2002. I was able to establish these dates because my bargaining unit representative, Joseph Waterer, was subjected to drug testing beginning at 11:05 PM on August 28, 2002. Mr.Waterer consented to provide me with a copy of his Federal Drug Testing Custody and Control Form (Specimen ID No.

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[1] See Exhibit A, e-mail from Terry Whitman to robert.rigg@faa.gov sent Thursday, September 26, 2002 7:39 AM.

35241699).

When Mr. Waterer relieved me from my shift at approximately 11:00 PM on September 25, 2002, he related to me his attempts to return Ms. Gerlach's call that afternoon by leaving messages on the answering machine in her office at or after 3:00 PM. When Mr. Waterer stated that Ms. Gerlach did not respond to the messages before he left for work the same evening, I responded that I saw Ms. Gerlach leave the parking lot between 4:00 PM and 4:30 PM that evening.

On September 27, 2002, I received a reply from Dr. Rigg to my e-mail message of September 26, 2002 deferring back to "...those who have jurisdiction..."[2] Each test is authored by Dr. Rigg in his role as Medical Review Officer (MRO) for substance testing and could not be authorized otherwise.

Mr. Monds responded to my challenge to the Agency's authority to conduct makeup tests for random testing in an e-mail dated 9/26/02.[3] In this e-mail response, Mr. Monds stated that he looked through the applicable Agency order "3910.1C"[4] and acknowledged "...it does not address exactly what you asked about." Then Mr. Monds referred to Guidance for Supervisors and Managers and Guidance for Working the Test List in the Site Coordinators Handbook (SC Handbook).[5] Mr. Monds also directed me to a web site containing the referenced directives.[6]

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[2] See Exhibit B, e-mail from robert.rigg@faa.gov sent Friday, September 27, 2002.

[3] See Exhibit C, e-mail forwarded to Terry Whitman, originally from Mack Monds to Terry Whitman dated 09/26/02 3:35 PM, Subject: Random testing question.

[4] See Exhibit D, applicable portions of DOT Order 3910.1C (12-28-94), Drug and Alcohol-Free Departmental Workplace.

[5] See Exhibit E, applicable portions of FAA Site Coordinators Handbook.

[6] See Exhibit C, reference to http://www.faa.gov/avr/aam/isap/!

I examined these directives in addition to the Department of Transportation's Drug and Alcohol Testing Guide[7] located at the aforementioned web site for myself. I concluded that nothing in these directives authorized rescheduling for an employee who was never notified of selection for testing due to a legitimate reason beyond the employee's control.

On September 25, 2002, Mr. Monds claimed that the makeup test was for August 28, 2002 because I was within two hours of the end of my shift. In my September 26 e-mail to Dr. Rigg, I documented that Mr. Monds showed me my name on a selection list, although my no-show reason was concealed.

Whether an employee is near the end of a scheduled work shift or off duty, these are legitimate no-show reasons. The SC Handbook directs the SC to compute an estimated time to accomplish all testing, and to move down the list in sequential order, identifying and annotating the test list of employees who are not available and why.[8] The SC Handbook further directs the SC to proceed to the next employee on the selection list, repeating the process until the test list is exhausted.[9]

The only authorization in the handbook for rescheduling an employee under random testing is when the employee has been notified of selection for random testing, has proceeded to the test site, but fails to produce a sufficient amount of urine (45 milliliters).[10] This did not apply to

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[7] See Exhibit F, applicable portions of Department of Transportation, Drug and Alcohol-Free Departmental Workplace Drug and Alcohol Testing Guide.

[8] See Exhibit E, (p. 5), Section IV.A(4), Phase II.

[9] See Exhibit E (p. 6), Section IV.A(7).

[10] See Exhibit E (p. 7), Section IV.C. Procedures for Reschedules. Also see Exhibit F (pp. 3, 4), Chapter VIII.C. Failure of Employee to Provide Urine Specimen.

me since I was not notified of selection for testing on August 28, 2002, and obviously never proceeded to the test site.

INJURY

Ultimately, there is no authority to conduct a makeup test under random testing for an employee who has been legitimately excused the day the testing was originally conducted. It is not authorized by Title 49 U.S.C. In his e-mail reply of September 26, 2002, DPC Malcolm Monds admitted that DOT Order 3910.1.C. "...does not address exactly what you asked about." Mr. Monds further claimed "All this information is located in the Site Coordinator's Handbook" when in fact no authorization exists for "makeup tests" for employees who were not notified of selection on the date scheduled for testing. What the Site Coordinator's Handbook does contain is an admonition to the Site Coordinator (SC) to follow the procedures for working the test list closely as this "...will prohibit the SC from 'picking and choosing' employees who are identified for random testing."[11]

On October 2, 2002, I encountered fellow employee Mark Ramp at work and explained to him that just after I talked to him on September 25, 2002, that I had been subjected to substance testing for the fifteenth time and that this time I was told it was a "makeup test." Mr. Ramp related to me that he had served as a union observer for substance testing and that it was his experience that when an employee was unavailable for testing that the testers moved to the next employee on the test list. Mr. Ramp further indicated to me that as a union observer he had never heard of makeup tests.

This reinforces my claim that the testing is not random. In defining random testing, DOT Order 3910.1.C directs "Under this type of testing, all covered employees shall have an equal

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[11] See Exhibit E (p. 6), Section IV.A(8).

statistical chance of being selected for testing within a specified time frame."[12]

In the immediate context, the specified time would be the midnight shift beginning at 11:00 PM August 28, 2002 and ending on August 29, 2002. The testing team violated my right to an equal statistical chance under this order by testing me 28 days after the above specified time frame after stating to me that I had a legitimate no-show reason. Exactly what the no-show reason is remains to be determined.

Mr. Monds' claim that it was necessary to conduct makeup tests in order to exhaust the test list is contradicted by the SC Handbook to which he referred me in his September 25 e-mail reply. The SC Handbook directs "If an employee is unavailable for testing, the next employee on the list will be notified to report for testing. This process continues until the predetermined number of tests for that day are done or the list is exhausted, whichever comes first."[13]

Subjecting me to a makeup test on September 25, 2002 after the list was exhausted on August 29, 2002 violates my right to a fair distribution of tests under Title 49 U.S.C., Section 45104(8) and DOT Order 3910.1.C., Chapter IV.4.a. The makeup test on September 25, 2002 also raises a question about Mr. Monds' claim that makeup testing is not done to fill a testing quota for the contractors.

In the overall context, prima facie evidence exists pointing to Agency officials who have violated my right to an equal statistical chance of selection under Title 49 U.S.C., Section 45104(8) and DOT Order 3910.1.C., Chapter IV.A.a through the use of questionable and possibly illegal selection lists.

This latest incident on September 25, 2002 highlights the lengths to which government officials will go to selectively tar-

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[12] See Exhibit D (pp. 2, 3), Chapter IV.4.a Random Testing.

[13] See Exhibit E (p. 4) Section II.A. Random Drug-Testing Checklist for Site Coordinators (SC).

get me for substance testing which is advertised as random. The incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample.

I, TERRY L. WHITMAN, declare under penalty of perjury, that I have reviewed the above MOTION, and that the information contained in this MOTION is true and correct.

DATED this day of October 18, 2002, at Anchorage, Alaska.

TERRY L. WHITMAN
Pro Per Plaintiff

NAGE Term Agreements
Human Resource Management (AHR)

NATIONAL AGREEMENT
Between the ASSOCIATION OF GOVERNMENT EMPLOYEES AGREEMENT, SEIU/AFL-CIO
and the
FEDERAL AVIATION ADMINISTRATION
DEPARTMENT OF TRANSPORTATION

May 26,1998

TABLE OF CONTENTS

Parties to the Agreement
Article 1 - Recognition and Unit Designation
Article 2 - Employee Rights
Article 3 - Employer Rights
Article 4 - Union Rights
Article 5 - Union Representation
Article 6 - Negotiations
Article 7 - Holidays
Article 8 - Downsizing (RIF)
Article 9 - Leave
Article 10 - Use of Employer's Facilities and Support
Article 11 - Dues Withholding
Article 12 - Watch Schedules and Shift Assignments
Article 13 - Grievance Procedure
Article 14 - Arbitration Procedure
Article 15 - Employee Assistance Program
Article 16 - Adverse Weather
Article 17 - Overtime

Article 18 - New Facilities/Current Facility Expansion
Article 19 - Position Descriptions
Article 20 - Procedures for Voluntary Application and Internal Placement
Article 21 - Acquired Immune Deficiency Syndrome
Article 22 - Equal Employment Opportunity (EEO)
Article 23 - Suggestion Program
Article 24 – Fare Subsidies for Employees
Article 25 - Employee Records
Article 26 - Operational Error/Deviation Investigation, Reporting and Review Board
Article 27 - Disciplinary, Adverse, and Performance Based Actions
Article 28 - Publicity
Article 29 - FAA Regulations
Article 30 - Printing of the Agreement
Article 31 - Duration and Amendments

PARTIES TO THE AGREEMENT

This Agreement is made by and between the National Association of Government Employees, SEIU/AFL-CIO ("the Union") and the Federal Aviation Administration, Department of Transportation ("the Employer"). The Union and the Employer are referred to collectively as "the Parties".

* * * *

ARTICLE 13
GRIEVANCE PROCEDURE

Section 1. Except for matters excluded in this Agreement, a grievance is defined as a complaint: (1) by any unit employee concerning any matter relating to the employment

of the employee; (2) by the Union concerning any matter relating to employment of unit employees; (3) by any unit employee, the Union, or the Employer concerning (a) the effect or interpretation, or a claim of breach of this Agreement or; (b) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

Section 2. The expeditious settlement of grievances at the lowest possible level is in the best interest of the government service. The Union shall ensure that, when representing employees of the unit, no complaint or grievance will be taken or pursued without first having been brought to the attention of the Employer for possible resolution.

Section 3. Unit employees covered by this Agreement may present a grievance with or without union representation at the grievant's discretion. However, the Union shall have the right to have its representative present at the grievance meeting. This right to individual representation does not include the right to take the matter to arbitration, unless the Union agrees to do so.

Section 4. The following matters are specifically excluded:

a. Political activities.

b. Retirement, Life or Health Insurance.

c. Suspension or removal for national security reasons.

d. Examination, certification, or appointment.

e. Position Classification which does not result in loss of grade or pay of an employee.

f. Non selection for promotion from a group of properly ranked and certified candidates.

g. Allegations of mismanagement.

h. EEO complaints.

i. Matters appealable to the Merit Systems Protection Board and Office of Special Counsel.

j. Termination of temporary/probationary employees.

k. The adoption or nonadoption of a suggestion, except where an employee submitted a suggestion which was rejected and within one year another employee subsequently submitted the same suggestion which was adopted and an award granted.

l. The decision to grant an award except where the allegation is that the decision was arbitrary and capricious, or inequitable.

Section 5. Grievances may be initiated by employees, either singularly or jointly, or by the Union, or by the Employer. An employee or group of employees in the unit may be represented only by the exclusive representative, or by a person appointed by the Union, in filing a grievance under the negotiated procedure.

Section 6. The Employer and the Union expect employees and supervisors to make a sincere effort to reconcile their differences. When such efforts fail, however, the following procedures are established for settlement of grievances:

Step 1. A grievance must be discussed with the employee's immediate supervisor within fifteen (15) calendar days after the occurrence of the matter which precipitated the grievance. An employee filing after fifteen (15) calendar days of the occurrence has the burden of showing he/she could not have been aware of the event at the time of occurrence. The grievance shall first be discussed informally by the aggrieved employee and his/her representative, if any, and the immediate supervisor involved.

The aggrieved employee or his/her representative, if any, must inform the supervisor a grievance is being filed. If the matter is not settled within fifteen (15) calendar days from the time of this meeting, the grievance may be moved to the next step.

Step 2. If no satisfactory settlement is reached in Step 1, the grievance shall be reduced to writing, stating the issue(s) involved and the corrective or remedial action sought, and submitted to the Facility Manager or his/her designee within the fifteen (15) calendar days after the Step 1 decision. The employee will be advised of the Facility Manager's or designee's decision, in writing, within fifteen (15) calendar days after receipt of said grievance. By mutual consent, a meeting will be held to discuss the grievance and attempt resolution.

Section 7. If the employee is in a duty status, a reasonable amount of official time will be granted an aggrieved employee to present a grievance on the employer's premises through this grievance procedure; however, no overtime/compensatory time/credit hours will be paid/authorized to any such employee. An employee desiring official time for the foregoing purposes shall inform his/her immediate supervisor, if available, or the next higher level of line supervisor who is available, of the reason he/she desires to absent him/herself from his/her facility.

Section 8. If two or more employees initiate identical grievances (where the basis for the grievance and corrective action being sought are identical), the Union, if it has been designated as representative, will call the employees together and have them select one of the grievances for processing. The decision made on the grievance selected for processing will be equally applicable to all of the other identical griev-

ances. The Union will inform the Employer of multiple grievants, the individual selected as the representative grievant, and the names of all the other employees party to the grievance.

Section 9. Once a grievance has been accepted for processing under this Grievance Procedure, failure of the aggrieved employee or the Union to comply with any applicable time limit terminates further consideration of the grievance. Failure of a management official of the Employer to comply with any applicable processing time limit will entitle the grievant to advance to the next step. Any time limits specified in the Agreement may be extended by mutual written agreement by the Parties.

Section 10. Employer grievances shall be filed in writing by the Facility Manager, or designee, with the NAGE facility representative, or his/her designee, within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and the corrective relief sought. The NAGE facility representative, or his/her designee, shall issue a written decision within fifteen (15) calendar days of receipt of the grievance. By mutual consent a meeting will be held to discuss the grievance and attempt resolution.

Section 11. Employer grievances at the regional level shall be filed in writing by the Division Manager, or his/her designee, with the NAGE Regional Director, or his/her designee, within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and the corrective relief sought. The NAGE Regional Director, or his/her designee, shall issue a written decision within fifteen (15) calendar days of receipt of the griev-

ance. By mutual consent a meeting will be held to discuss the grievance and attempt resolution.

Section 12. Union grievances shall be filed in writing with the Facility Manager, or his/her designee, by the NAGE facility representative, within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and the corrective relief sought. The Facility Manager, or his/her designee, shall respond within fifteen (15) calendar days of receipt of the grievance. By mutual consent, a meeting will be held to discuss the grievance and attempt resolution.

Section 13. Union grievances at the Regional level shall be filed, in writing, with the Division Manager, or his/her designee, by the NAGE Regional Director or other designee of the Union within fifteen (15) calendar days of the event or knowledge of the event. Union grievances at the National level shall be filed in writing, with the Program Director of Labor and Employee Relations, by the NAGE Local R3-10 President within fifteen (15) calendar days of the event or knowledge of the event. The grievance shall specify the basis for the grievance and corrective relief sought. The Division Manager or the Program Director of Labor and Employee Relations, shall respond within fifteen (15) calendar days of receipt of the grievance. By mutual consent a meeting will be held to discuss the grievance and attempt resolution.

Section 14. Grievances not resolved through the provisions of this Agreement may be referred to Arbitration by either the Union or the Employer within ten (10) calendar days of the receipt of the decision completing the negotiated grievance procedure.

Section 15. If there are questions as to whether or not a grievance is on a matter subject to the grievance procedure in this Agreement or is subject to arbitration, the issue shall be submitted to the arbitrator for decision. Prior to submission of any grievance on the merits, a decision will be rendered on questions of timeliness, grievability, or arbitrability by an arbitrator. By mutual agreement, the Parties may select another arbitrator to render a decision on the merits.

Section 16. The Parties agree to approach grievances as a resolution process and shall not withhold evidence during the process in an effort to gain advantage during arbitration. The Parties will exchange copies of files and records that they plan to use as evidence before an arbitrator. This information will be exchanged at least seven (7) calendar days in advance of the arbitration hearing. The Parties will exchange witness lists seven (7) calendar days prior to the arbitration hearing. Documentary evidence not provided to the other party prior to the arbitration hearing but first offered at the hearing shall cause the record to remain open until the party not provided the evidence has ample opportunity to rebut the new evidence.

ARTICLE 14
ARBITRATION PROCEDURE

Section 1. When a matter pursued through the Negotiated Grievance Procedure is not satisfactorily resolved, the grievance may be referred to arbitration upon written request of the Employer or the Union. The request to invoke arbitration must be submitted within ten (10) calendar days of receipt of the decision completing the negotiated grievance procedure, otherwise the request for arbitration will be untimely. Only the Employer and the NAGE Local R3-10 President may invoke arbitration.

Section 2. Within the ten (10) calendar day time limit, the moving party will request the Federal Mediation and Conciliation Service to provide a list of five (5) arbitrators and will deliver a copy of the request to the other party. Representatives of the Parties will confer within ten (10) calendar days of receipt of the list of arbitrators to select one to hear the grievance. The representatives will each strike one Arbitrator's name from the list of five (5); they will then repeat this procedure. The remaining name will be the duly selected Arbitrator. A flip of the coin will decide which party strikes first.

Section 3. Upon mutual agreement of the Parties a transcript will be made of the hearing. A copy will be furnished to the arbitrator, and each party will be furnished a copy. Any additional copies will be paid for by the requesting party. The cost of a transcript requested by one party for its exclusive use and not shared shall be borne by the requesting party. If it is mutually agreed to request a transcript, the cost will be borne equally.

Section 4. The cost of the arbitrator's fees and expenses will be paid by the losing party. If the grievance is sustained, the grieving party is the prevailing party and incurs no cost. If the grievance is denied, the grieving party is the losing party and pays the arbitrator's fees and expenses. In cases of a split decision, such costs will be borne equally by the Parties * * *.

* * * *

Supreme Court, U.S.
FILED
OCT 26 2005
OFFICE OF THE CLERK

No. 04-1131

In the Supreme Court of the United States

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.* (CSRA), provides that "any collective bargaining agreement" between the government and employees' unions "shall provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Until 1994, Section 7121(a)(1) also provided that, with specified exceptions not implicated here, "the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988). As part of a 1994 technical and conforming amendment, the word "administrative" was added to Section 7121(a)(1), which now provides that "the [collective bargaining agreement grievance] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

The questions presented are as follows:

1. Whether the 1994 technical amendment to 5 U.S.C. 7121(a)(1) implicitly authorized federal employees to sue in federal district court for employment grievances, although the CSRA's comprehensive remedial system lacks an express judicial remedy for grievances.

2. Whether the CSRA precludes petitioner from seeking equitable relief from a federal district court on the ground that his employer allegedly violated his constitutional rights by requiring him to take drug tests.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Summary of Argument 11
Argument 14
I. The CSRA provides the exclusive remedies for the employment claims of federal employees 14
A. The CSRA precludes judicial review of grievances covered by a CBA 15
B. The 1994 Amendments to the CSRA did not confer a right to judicial review of grievances covered by a CBA 24
II. Petitioner's constitutional claims must be raised through the procedures prescribed by the CSRA 32
A. The CSRA provides comprehensive procedures for resolving employment disputes of federal employees, including those raising constitutional issues 34
B. Petitioner may not circumvent the CSRA's mechanisms by couching his complaint in constitutional terms and filing suit directly in district court 37
C. The CSRA would not preclude judicial review of a constitutional claim for equitable relief that remained at the end of the CSRA review process 45
Conclusion 50
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Abbott v. *United States*, 144 F.3d 1 (1st Cir. 1998) 24, 25

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 36

Aircraft & Diesel Equip. Corp. v. *Hirsch*, 331 U.S. 752 (1947) 41

Alabama Pub. Serv. Comm'n v. *Southern Ry.*, 341 U.S. 341 (1951) 46

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 23, 24

Asociacion De Empleados v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003) 11

Association of Data Processing Serv. Orgs., Inc. v. *Camp*, 397 U.S. 150 (1970) 18

Barrentine v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) 22, 24

Bennett v. *Spear*, 520 U.S. 154 (1997) 44

Berrios v. *Department of the Army*, 884 F.2d 28 (1st Cir. 1989) 26, 32

Billop v. *Department of the Air Force*, 725 F.2d 1160 (8th Cir. 1984) 20

Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 16

Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 15, 18, 19, 38

Booth v. *Churner*, 532 U.S. 731 (2001) 43

Bowen v. *Michigan Acad. of Family Physicians*, 476 U.S. 667 (1986) 42, 47

Cases—Continued: Page

Broadway v. *Block*, 694 F.2d 979 (5th Cir. 1982) .. 20, 26
Broughton v. *Courtney*, 861 F.2d 639 (11th Cir. 1988) 26
Brown v. *GSA*, 425 U.S. 820 (1976) 34
Bureau of Alcohol, Tobacco & Firearms v. *FLRA*, 464 U.S. 89 (1984) 41
Bush v. *Lucas*, 462 U.S. 367 (1983) .. 2, 12, 21, 34, 45, 47
Cafeteria Workers Union, Local 473 v. *McElroy*, 367 U.S. 886 (1961) 46
Califano v. *Sanders*, 430 U.S. 109 (1977) 47
Camp v. *Pitts*, 411 U.S. 138 (1973) 50
Carducci v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) 3, 20, 22
Carter v. *Gibbs*, 909 F.2d 1452 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990) 17, 24, 25, 31
Christian v. *New York State Dep't of Labor*, 414 U.S. 614 (1974) 40
City of San Diego v. *Roe*, 125 S. Ct. 521 (2004) 37
City of Sherrill v. *Oneida Indian Nation*, 125 S. Ct. 1478 (2005) 45
Clark v. *Department of the Army*, 997 F.2d 1466 (Fed. Cir. 1993) 30
Connick v. *Myers*, 461 U.S. 138 (1983) 37
Cook County Nat'l Bank v. *United States*, 107 U.S. 445 (1883) 15
Cornelius v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) 46
Demore v. *Kim*, 538 U.S. 510 (2003) 47, 48

Cases—Continued: Page

Director of Revenue v. *CoBank ACB*, 531 U.S. 316 (2001) 28
Dotson v. *Griesa*, 398 F.3d 156 (2d Cir. 2005), petition for cert. pending, No. 04-1276 (filed Mar. 22, 2005) 32
Dugan v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984) 20
EEOC v. *FLRA*, 476 U.S. 19 (1986) 41
Eastern Bridge, LLC v. *Chao*, 320 F.3d 84 (1st Cir. 2003) 37
Faragher v. *City of Boca Raton*, 524 U.S. 775 (1989) 46
Fausto v. *United States*, 791 F.2d 1554 (Fed. Cir. 1986), rev'd, 484 U.S. 439 (1988) 18
Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 50
Fornaro v. *James*, 416 F.3d 63 (D.C. Cir. 2005) ... 17, 19
Garrison, 67 M.S.P.R. 154 (1995) 35
Gergick v. *Austin*, 997 F.2d 1237 (8th Cir. 1993), cert. denied, 511 U.S. 1029 (1994) 17
Graham v. *Ashcroft*, 358 F.3d 391 (D.C. Cir.), cert. denied, 125 S. Ct. 83 (2004) 20, 22
Greenway v. *United States*, 163 Ct. Cl. 72 (1963) 16
Griffith v. *FLRA*, 842 F.2d 487 (D.C. Cir. 1988) 49
HUD v. *Rucker*, 535 U.S. 125 (2002) 31
Hall v. *Clinton*, 235 F.3d 202 (4th Cir. 2000) 17
Hallock v. *Moses*, 731 F.2d 754 (11th Cir. 1984) 32
Hardison v. *Cohen*, 375 F.3d 1262 (11th Cir. 2004) 17

Cases—Continued: Page

Harrison v. *Bowen*, 815 F.2d 1505 (D.C. Cir. 1987) 26
Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) 28
Hubbard v. *EPA*, 809 F.2d 1 (D.C. Cir. 1987), aff'd on reh'g *sub nom. Spagnola* v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) 21
Ingram v. *Secretary of HHS*, 830 F.2d 67 (6th Cir. 1987) 37
Johnson v. *Peterson*, 996 F.2d 397 (D.C. Cir. 1993) 25
Jones v. *TVA*, 948 F.2d 258 (6th Cir. 1991) 26
Karahalios v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527 (1989) 12, 16, 19, 23, 24, 25, 26, 27, 44
Laborers Int'l Union Local 1376, 60 F.L.R.A. 202 (2004) 34
Ledford v. *West*, 136 F.3d 776 (Fed. Cir. 1998) 41
Leefer v. *Administrator, NASA*, 543 F.2d 209 (D.C. Cir. 1976) 45
Lehman v. *Morrissey*, 779 F.2d 526 (9th Cir. 1985) 17
Lindahl v. *OPM*, 470 U.S. 768 (1985) 2, 4, 19, 33, 48, 49
Lombardi v. *SBA*, 889 F.2d 959 (10th Cir. 1989) 32
Lorillard v. *Pons*, 434 U.S. 575 (1978) 26
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 46
McCarthy v. *Madigan*, 503 U.S. 140 (1992) 40

Cases—Continued: Page

McDonald v. *City of W. Branch*, 466 U.S. 284 (1984) 22
McKart v. *United States*, 395 U.S. 185 (1969) 39, 40
McNary v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) 42
Meredith Corp. v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987) 41
Mitchum v. *Hurt*, 73 F.3d 30 (3d Cir. 1995) 32
Montplaisir v. *Leighton*, 875 F.2d 1 (1st Cir. 1999) 17
Morris v. *Gressette*, 432 U.S. 491 (1977) 18
Mudge v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002) 11, 17
Muniz v. *United States*, 972 F.2d 1304 (Fed. Cir. 1992) 19, 39
National Treasury Employees Union v. *FLRA*, 986 F.2d 537 (D.C. Cir. 1993) 41
National Treasury Employees Union v. *FLRA*, 112 F.3d 402 (9th Cir. 1997) 49
National Treasury Employees Union v. *Von Raab*, 489 U.S. 656 (1989) 37, 42
O'Connell v. *Hove*, 22 F.3d 463 (2d Cir. 1994) 23, 24, 25, 26
Ohio v. *Robinette*, 519 U.S. 33 (1996) 45
Parker v. *King*, 935 F.2d 1174 (11th Cir. 1991) 25
Petrini v. *Howard*, 918 F.2d 1482 (10th Cir. 1990) 17, 26
Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985) 20, 21, 26, 32, 45

Cases—Continued: Page

Premachandra v. *United States*, 739 F.2d 392 (8th Cir. 1984) 26
Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440 (1989) 20
Public Util. Comm. v. *United States*, 355 U.S. 534 (1958) 41
Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) 46
Ryon v. *O'Neill*, 894 F.2d 199 (6th Cir. 1990) 20
Salinas v. *United States*, 323 F.3d 1047 (Fed. Cir. 2003) 17
Sampson v. *Murray*, 415 U.S. 61 (1974) 46
Saul v. *United States*, 928 F.2d 829 (9th Cir. 1991) 17, 25, 32
Schrachta v. *Curtis*, 752 F.2d 1257 (7th Cir. 1985) 26
Smith v. *Phillips*, 455 U.S. 209 (1982) 44
Spagnola v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988) 17, 21
Steadman v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963 (D.C. Cir. 1990) 23, 32, 40
Stephens v. *HHS*, 901 F.2d 1571 (11th Cir.), cert. denied, 498 U.S. 998 (1990) 20
Sturges v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) 20
Suzal v. *Director, USIA*, 32 F.3d 574 (D.C. Cir. 1994) 40

Cases—Continued: Page

Switchmen's Union v. *National Mediation Bd.*, 320 U.S. 297 (1943) 15, 19
Taydus v. *Cisneros*, 902 F. Supp. 288 (D. Mass. 1995) 20
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) 35, 36, 38, 39, 42
Tiltti v. *Weise*, 155 F.3d 596 (2d Cir. 1998) 20
United States v. *Booker*, 125 S. Ct. 738 (2005) 42
United States v. *Craft*, 535 U.S. 278 (2002) 31
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) . 15, 19
United States v. *Fausto*, 484 U.S. 439 (1988) ... *passim*
United States v. *Testan*, 424 U.S. 392 (1976) 16
United States Dep't of the Treasury v. *FLRA*, 43 F.3d 682 (D.C. Cir. 1995) 48
Veit v. *Heckler*, 746 F.2d 508 (9th Cir. 1984) .. 11, 20, 26
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 46
Weatherford v. *Dole*, 763 F.2d 392 (10th Cir. 1985) 20
Webster v. *Doe*, 486 U.S. 592 (1998) 18, 47

Constitution, statutes, regulations and rule:

U.S. Const.:
Amend. I 32, 34
Amend. IV 35, 42
Act of Oct. 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361:
§ 9, 108 Stat. 4365 29
§ 9(b), 108 Stat. 4365 8

Statutes, regulations, and rule—Continued: Page

§ 9(c), 108 Stat. 4366 8

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 12, 15, 18, 20, 36

5 U.S.C. 701(a)(1) 12, 18

5 U.S.C. 702 18

Back Pay Act of 1966, Pub. L. No. 89-380, 80 Stat. 94 (5 U.S.C. 5596) 12, 15, 16, 17, 18

Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*) 6, 8, 18, 19, 23

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*) .. *passim*

Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, § 347, 109 Stat. 460 2

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 24, 25

29 U.S.C. 216(b) 31

Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213:

§ 221(1), 110 Stat. 3227 (49 U.S.C. 106 note) 3

§ 221(14), 110 Stat. 3228 (49 U.S.C. 106 note) 3

§ 253, 110 Stat. 3237 (49 U.S.C. 40122) 2

Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (21 U.S.C. 301 *et seq.*) 36

Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. 801 *et seq.* 38

Statutes, regulations, and rule—Continued: Page

Tucker Act, ch. 359, 24 Stat. 505 (28 U.S.C. 1491) 12, 16, 17, 18
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61:
§ 307(a), 114 Stat. 124 (49 U.S.C. 40122(g)) 2
§ 307(d), 114 Stat. 126 2
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5 U.S.C. 2301-2305 (Ch. 23) 4
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5 U.S.C. 2301(b)(2) 5
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Statutes, regulations, and rule—Continued: Page

5 U.S.C. 2302(b)(1) 5, 8
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5 U.S.C. 2302(b)(8) 5, 6
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5 U.S.C. 7123 ..... 4, 48, 49, 7a
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5 U.S.C. 7123(a)(1) 7, 48, 7a
5 U.S.C. 7123(b) 23, 49, 7a
5 U.S.C. 7501-7543 (Ch. 75) 4
5 U.S.C. 7502 4
5 U.S.C. 7503 4
5 U.S.C. 7503(b) 4
5 U.S.C. 7512 ..... 4, 7, 8, 18, 28
5 U.S.C. 7513(b) 4
5 U.S.C. 7513(d) 4, 21
5 U.S.C. 7701-7703 (Ch. 77) 5
5 U.S.C. 7701 4
5 U.S.C. 7702 23
5 U.S.C. 7703 ..... 7, 8, 21
5 U.S.C. 7703(a)(1) 21
5 U.S.C. 7703(b) 35
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Statutes, regulations, and rule—Continued: Page

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49 U.S.C. 40122(g)(2)(A) 5, 6
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49 U.S.C. 40122(g)(2)(H) 4, 5, 35
49 U.S.C. 40122(g)(3) 4, 21
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49 U.S.C. 45101 *et seq.* 24
49 U.S.C. 45102(b) 42
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49 U.S.C. 45104(8) 14, 35, 40, 42
49 U.S.C. 46110(a) (2000 & Supp. II 2002) 4
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Section 771.101 27
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Sup. Ct. R. 15.2 44

Miscellaneous:

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In the Supreme Court of the United States

No. 04-1131

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 382 F.3d 938. The opinion of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. A petition for rehearing was denied on November 24, 2004 (Pet. App. 16a). The certiorari petition was filed on February 22, 2005, and was granted on June 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. *Background.* a. Before 1978, federal employment law consisted of an "outdated patchwork of statutes and rules built up over almost a century." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988). There was no systematic scheme for review of personnel actions. Some employees were afforded administrative review of adverse personnel action by statute or executive order; others had no right to such review. Federal employees often sought judicial review of agency personnel decisions in "district courts in all Circuits and the Court of Claims," through "various forms of actions * * * including suits for mandamus, injunction, and declaratory judg-

ment." *Id.* at 444-445 (citations omitted); accord S. Rep. No. 969, 95th Cong., 2d Sess. 63 (1978). "Criticism of this 'system' of administrative and judicial review was widespread." *Fausto*, 484 U.S. at 445. There was "particular * * * dissatisfaction" with the lack of uniformity that stemmed from having cases adjudicated "under various bases of jurisdiction" in numerous district courts and the Court of Claims. *Ibid.* In addition, "beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational." *Ibid.*; accord *Lindahl* v. *OPM*, 470 U.S. 768, 797-799 (1985).

Congress responded by enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, which "comprehensively overhauled the civil service system," *Lindahl*, 470 U.S. at 773, and established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 444-445. The CSRA is the culmination of a century of legislative "consideration of the conflicting interests involved in providing job security, protecting the right[s of workers], and maintaining discipline and efficiency in the federal work force." *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983). The CSRA regulates virtually every aspect of federal employment and "prescribes in great detail the protections and remedies applicable * * *, including the availability of * * * judicial review." *Fausto*, 484 U.S. at 443.

b. In a series of enactments between 1995 and 2000, Congress revised federal personnel law applicable to the Federal Aviation Administration (FAA), an agency of the Department of Transportation (DOT).[1] In recognition of the "significant problems" that confront "the national air transportation sys-

[1] Pub. L. No. 104-50, § 347, 109 Stat. 460 (repealed by Pub. L. No. 106-181, § 307(d), 114 Stat. 126); Pub. L. No. 104-264, § 253, 110 Stat. 3237; Pub. L. No. 106-181, §§ 307(a), 308(b), 114 Stat. 124, 126.

tem," and to afford the FAA increased flexibility with personnel issues to help it fulfill its "unique" mission of "operat[ing] 24 hours a day, 365 days of the year * * * [in] a state-of-the-art industry," Pub. L. No. 104-264, § 221(1) and (14), 110 Stat. 3227-3228, Congress made certain provisions of the CSRA applicable to the FAA, but exempted the agency from other provisions. See 49 U.S.C. 40122(g)(2). In lieu of the CSRA provisions Congress made inapplicable, it directed the FAA to establish a "personnel management system * * * that addresses the unique demands on the agency's workforce." 49 U.S.C. 40122(g)(1). To discharge that responsibility, the agency established the FAA Personnel Management System, which closely parallels the CSRA. See, *e.g.*, FAA, *FAA Personnel Management System* (1996) <http://www. faa.gov/ahr/policy/PMS/personel.htm> (*Pers. Mgmt. Sys.*). The applicable provisions of the CSRA and the FAA Personnel Management System together comprise a hybrid personnel system that is as fully comprehensive as that created by the CSRA, covering personnel practices, adverse actions, labor relations, and employee grievances. Pet. App. 4a.

2. *The Remedial Framework of the CSRA and the FAA System.* The CSRA and the FAA Personnel Management System essentially create a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the systems provide as follows: (a) "for major personnel actions specified in the statute ('adverse actions')," both systems afford an explicit right of judicial review in the Federal Circuit "after extensive prior administrative proceedings," *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.); (b) for specified "personnel actions infected by particularly heinous motivations or disregard of law ('prohibited personnel practices')," the systems provide administrative mechanisms to be followed by judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (c) for minor personnel matters

involving bargaining-unit employees, the systems provide a grievance procedure followed by binding arbitration and sharply limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, 7123; for non-bargaining unit employees, review generally is limited to a separate internal agency grievance mechanism, see, *e.g.*, *Pers. Mgmt. Sys.* Ch. III, ¶ 4.

a. *Adverse Actions.* CSRA provisions set forth in Chapters 43 and 75 of Title 5 create "an elaborate new framework for evaluating adverse personnel actions against [federal employees]." *Fausto*, 484 U.S. at 443 (quoting *Lindahl*, 470 U.S. at 774). Congress exempted the FAA from those two chapters, 49 U.S.C. 40122(g)(2), but the FAA system creates equivalent procedural protections. Both the CSRA and the FAA system require advance written notice of a proposed "major adverse action" (*i.e.*, removal, suspension for more than 14 days, reduction in grade or pay, or furlough of 30 days or less, 5 U.S.C. 7512; see 49 U.S.C. 40122(j) (also including reductions in force)), and they afford a right of representation, reasonable time to respond, and a written final decision. 5 U.S.C. 4303(b), 7503(b), 7513(b); *Pers. Mgmt. Sys.* Ch. III, ¶ 3(g)-(q). Both systems provide employees a right to appeal the agency action to (and obtain a formal hearing by) the Merit Systems Protection Board (MSPB), 5 U.S.C. 4303(e), 7513(d), 7701; 49 U.S.C. 40122(g)(3), and to seek judicial review of the MSPB's decision in the Federal Circuit, 5 U.S.C. 7703(b)(1); 49 U.S.C. 40122(g)(2)(H). Employees who have been suspended for less than 14 days (a "minor adverse action," 5 U.S.C. 7502) are not provided a right to appeal to the MSPB or to seek judicial review. See 5 U.S.C. 7503.[2]

b. *Prohibited Personnel Practices.* Chapter 23 of Title 5 "establishes the principles of the merit system of employ-

[2] The FAA system also provides employees the right to appeal a major adverse action through the FAA's "Guaranteed Fair Treatment" procedure, with a right of review in a court of appeals. *Pers. Mgmt. Sys.* Ch. III, ¶ 5(m); see 49 U.S.C. 40122(h) and (i), 46110(a) (2000 & Supp. II 2002).

ment." *Fausto*, 484 U.S. at 446. The chapter forbids agencies from engaging in specified "prohibited personnel practices," 5 U.S.C. 2302, defined broadly to include "personnel action" involving discrimination on the basis of race, color, religion, sex, national origin, handicap, or political affiliation; coercion of political activity; nepotism; retaliation against whistleblowers; and violation of any law, rule or regulation implementing or directly concerning the merit system principles set forth in 5 U.S.C. 2301, including the requirement that employees be accorded fair and equitable treatment with "proper regard for their privacy and constitutional rights."[3] 5 U.S.C. 2301(b)(2), 2302(b)(1), (2), (7), (8) and (12). Although Congress exempted the FAA from most of Chapter 23, 49 U.S.C. 40122(g)(2)(A), in its place, the FAA Personnel Management System established the agency's own list of merit principles, see *Pers. Mgmt. Sys.* Intro. ¶ VII, as well as a list of prohibited personnel practices, that largely track those recognized by the CSRA. Compare *id.* Intro. ¶ VIII, with 5 U.S.C. 2302(b).

The CSRA's enforcement provisions for prohibited personnel practices, see 5 U.S.C. 1204, 1211-1218, 1221, 7701-7703, largely apply to the FAA. 49 U.S.C. 40122(g)(2)(H). Those provisions direct employees who wish to challenge prohibited personnel practices to file a complaint with the Office of Special Counsel (OSC), 5 U.S.C. 1214(a)(1) and (3). If OSC finds reasonable grounds to believe an employee was or is to be subjected to a prohibited personnel practice, it may seek remedial action from the agency and the MSPB. 5 U.S.C. 1214(b)(2). An employee may seek judicial review in the Fed-

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[3] See 5 U.S.C. 2302(a)(2)(A) ("personnel action" means an appointment, promotion, disciplinary or corrective action, a detail, transfer, or reassignment, reinstatement, restoration, reemployment, performance evaluation, decisions concerning pay, benefits, or awards, a decision to order psychiatric testing, and any other significant change in duties, responsibilities, or working conditions). Although the FAA system does not expressly define "personnel action," in practice, the term has been given the same meaning as under the CSRA.

eral Circuit of any adverse decision of the MSPB in any case in which OSC has sought corrective action from the MSPB. 5 U.S.C. 1214(c)(1), 7703(b)(1); 49 U.S.C. 40122(g)(2)(A) and (H). Neither the CSRA nor the FAA system generally provides for review by the MSPB or judicial review of OSC's determination not to seek remedial action from the MSPB, *ibid.*[4] OSC must, however, provide the employee with its proposed findings of fact and legal conclusions, an opportunity to comment on them, and a final statement concerning the disposition of the complaint. 5 U.S.C. 1214(a)(1)(D) and (2). The CSRA and the FAA system expressly preserve any right or remedy available to an employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other anti-discrimination laws. 5 U.S.C. 2302(d); *Pers. Mgmt. Sys.* Intro. ¶ VIII(b)(ii).

c. *Grievances.* Chapter 71 of Title 5 governs federal labor relations and the work-related grievances of employees covered by a collective bargaining agreement (CBA). With one exception not implicated here, Chapter 71 applies to the FAA. 49 U.S.C. 40122(g)(2)(C). That chapter accords federal employees the right to join unions and obligates management to engage in collective bargaining. 5 U.S.C. 7102, 7111, 7114(a)(1), 7117. A union that is the exclusive representative of a designated unit, see 5 U.S.C. 7111, has a duty to represent the employees in that unit without discrimination and without regard to union membership. 5 U.S.C. 7114(a)(1).

The CSRA and the FAA system require that every CBA contain a procedure for "the settlement of grievances," 5 U.S.C. 7121(a)(1), although certain specified categories of disputes are excluded by statute from the grievance procedure, 5 U.S.C. 7121(c), and a CBA "may exclude any matter

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[4] An employee who brings a prohibited personnel practice claim involving whistleblowing covered by 5 U.S.C. 2302(b)(8) may seek corrective action from the MSPB if the OSC does not do so, and may seek judicial review of the MSPB's disposition of that claim. See 5 U.S.C. 1214(a)(3) and (c), 1221.

from the application of the grievance procedures," 5 U.S.C. 7121(a)(2). "Grievance" is defined broadly to include "any complaint * * * by any employee concerning any matter relating to the employment of the employee," 5 U.S.C. 7103(a)(9)(A), which includes (but is not limited to) both prohibited personnel practices and adverse actions. See 5 U.S.C. 7103(a)(9)(A) and (C)(ii). Any covered grievance that is not settled by the negotiated grievance procedure "shall be subject to binding arbitration which may be invoked by either the [union] or the agency." 5 U.S.C. 7121(b)(1)(C)(iii).

Either the union or the agency may challenge the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA), which may "take such action and make such recommendations concerning the [arbitrator's] award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. 7122(a). An FLRA decision concerning an arbitration award is not generally subject to judicial review, unless the matter involves an unfair labor practice; in such case, any "person" aggrieved by the FLRA order (including the agency, see 5 U.S.C. 7103(a)(1)) may seek review in the D.C. Circuit or the court of appeals for the circuit in which the person resides or transacts business. See 5 U.S.C. 7123(a)(1). The CSRA also provides a right to seek direct judicial review of an arbitrator's award in limited circumstances: if the grievance involves a major adverse action covered by 5 U.S.C. 4303 or 7512, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 to the same extent as if the matter had been decided by the MSPB. See 5 U.S.C. 7123(a)(1), 7122(a), 7121(f). The FLRA does not have authority to review the arbitral award concerning such a matter. See 5 U.S.C. 7122(a).

Employees who are not members of the bargaining unit and who have been the subject of minor adverse actions may pursue an internal agency grievance mechanism. See *Pers. Mgmt. Sys.* Ch. III, ¶ 4. Non-bargaining-unit employees (like

bargaining-unit employees) have no right to judicial review of minor adverse actions. See *id.* Ch. III, ¶ 4(f)(ii).

3. *The 1994 CSRA Amendment.* Before 1994, the CSRA gave employees a choice of avenues to address major adverse actions and those prohibited personnel practices that involve discrimination, but not other actions. If an employee covered by a CBA brought a grievance alleging a prohibited practice of discrimination under 5 U.S.C. 2302(b)(1) or involving an adverse action covered by 5 U.S.C. 4303 or 7512, the employee could elect to contest it either under the CBA's grievance procedures or under an alternative statutory procedure, many of which (*e.g.*, Title VII, or 5 U.S.C. 7703) independently provide for judicial review, 5 U.S.C. 7121(d) and (e). Section 7121(a)(1) stated that if the grievance did not involve a prohibited personnel practice based on discrimination (covered by subsection (d)) or a major adverse action (covered by subsection (e)), the negotiated grievance procedures "shall be the *exclusive procedures* for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988) (emphasis added).

In 1994, Congress added a new subsection (g) to Section 7121, which also gives employees covered by CBAs a choice of alternative remedies for prohibited personnel practices that do not involve discrimination. Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. Under new subsection (g), employees have the option to pursue any remedies they may have with OSC or the MSPB, or through the negotiated grievance process. *Ibid.* Congress also made a "Technical and Conforming Amendment[]," § 9(c), 108 Stat. 4366, that made two revisions to the second sentence of Section 7121(a)(1): it added subsection (g) to its list of statutory exceptions to the provision making grievance procedures exclusive, and it added the word "administrative" between "exclusive" and "procedures." As amended, Section 7121(a)(1) provides:

> Except as provided in paragraph (2) of this subsection [which permits matters to be excluded from negotiated grievance procedures], any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

4. *Proceedings in This Case.* a. Petitioner works for the FAA in Alaska as an Air Traffic Assistant. Pet. 2-3. As an FAA employee "whose duties include responsibility for safety-sensitive functions," petitioner is subject to random testing for illegal use of controlled substances. 49 U.S.C. 45102(b)(1) (2000 & Supp. II 2002). Petitioner's work is governed by a CBA entered into by the FAA and his union, the National Association of Government Employees. Pet. App. 2a. The CBA provides for both a mandatory grievance procedure and binding arbitration. See J.A. 21-28.

In June 2001, acting pro se, petitioner filed an unfair labor practice charge with the FLRA, alleging that the FAA had subjected him to a disproportionate number of drug and alcohol tests, Pet. App. 12a-13a, and claiming that the FAA's testing program "does not guarantee individual rights and the randomness of the selection process is suspect," *id.* at 3a. The FLRA denied petitioner's unfair labor practice charge, because the claim did not allege discrimination by the FAA based on protected union activity. *Ibid.* The FLRA explained that petitioner's "recourse is through the grievance procedures" of the CBA. *Ibid.* (internal quotation marks omitted).

Petitioner did not invoke the CBA's grievance procedures. Pet. App. 3a. Instead, again acting pro se, petitioner filed this suit in federal district court. *Ibid.*; J.A. 11. Petitioner's complaint alleged that the FAA had required him to take a disproportionate number of drug tests and the agency had thereby

"violated Title 49 U.S.C. 5331(d)(8)," governing alcohol and drug testing of mass transit employees, "which states that the Secretary of Transportation shall develop requirements that shall 'ensure that employees are selected [for testing] by non-discriminatory and impartial methods.'" J.A. 7, 13; see 49 U.S.C. 45104(8) (imposing same duty on FAA Administrator). Petitioner alleged that "[b]y [his] own informal methods," J.A. 9, he had determined that he had been subjected to a higher number of tests than other employees. *Ibid.* Petitioner asked that the FAA be required to conduct "a survey of similarly-situated employees to establish an average number of selections for substance-testing," J.A. 11, and, if the survey established that he had been tested excessively, to "remedy the situation" by, for example, "enjoining the [FAA] from subjecting [petitioner] to any further substance-testing" until similarly situated employees had been tested as many times as he. *Ibid.*

In a motion to supplement his complaint, petitioner alleged that, while at work on September 25, 2002, he had been required to submit to a substance-abuse test to "make up" an earlier test that he had missed. J.A. 13. Petitioner alleged that the FAA was not authorized "to conduct a makeup test," J.A. 17, and that "[t]he incident on September 25, 2002 violates my First Amendment right to privacy under the Constitution in that it is indistinguishable from having a government team show up at my door while I am off duty to order me to produce a urine sample." J.A. 19.

The district court dismissed petitioner's action. The court held that, in light of the CSRA's comprehensive remedial scheme, federal courts have "no power to review federal personnel decisions * * * unless such review is expressly authorized by Congress in the CSRA," Pet. App. 14a, and that petitioner's sole remedy was to submit his claims under the CBA's grievance and arbitration procedures. *Ibid.* The court also concluded that, because petitioner "fail[ed] to exhaust his

administrative remedies," the court could not provide him with a judicial remedy. *Id.* at 14a & n.17 (quoting *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984)).

b. The court of appeals affirmed. Pet. App. 1a-11a. It concluded that the FAA Personnel Management System precluded a direct action in federal court and made the CBA's negotiated grievance procedures petitioner's sole remedy. The court explained that the "well-established rule" is that, in light of the comprehensive remedial scheme provided by the CSRA and the FAA system, courts presume that they "have no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere." *Id.* at 7a. The court acknowledged that the Federal Circuit and the Eleventh Circuit had concluded that the 1994 amendment adding the word "administrative" to Section 7121(a)(1) implicitly authorized courts to review the grievances of federal employees covered by a CBA by limiting the scope of the exclusivity of the grievance procedures. *Id.* at 6a-7a (citing *Asociacion De Empleados* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003); *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002)). The court rejected that position, concluding that, in light of the comprehensiveness of the CSRA, implicit authorization was insufficient to support judicial review. Pet. App. 9a-10a.

The court of appeals also held that, even if (as petitioner maintained) his claim should be viewed as a "prohibited personnel practice" rather than a grievance, petitioner was required under the FAA system (and the CSRA) to seek corrective action from the OSC, and that that exclusive remedy "preclude[s] judicial review of [petitioner's] claimed 'prohibited personnel practice.'" Pet. App. 10a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that the FAA Personnel Management System's negotiated grievance proce-

dure provides the exclusive remedy for the grievances of employees who are covered by CBAs, and precludes a suit in district court wholly outside the CSRA's comprehensive remedial scheme. This Court has often held that the omission of a judicial-review provision for a particular type of claim from a comprehensive remedial scheme operates to foreclose further review of those claims. This Court repeatedly has applied that principle to hold that the CSRA's comprehensive remedial scheme limits federal employees to the remedies explicitly provided by statute. See *Fausto*, *supra*; *Karahalios* v. *National Fed'n of Employees*, 489 U.S. 527 (1989); *Bush*, *supra* (reaching same conclusion under pre-CSRA scheme). Petitioner errs in contending that the CSRA and FAA system permit federal employees to seek review of grievances under the Administrative Procedure Act (APA). This Court in *Fausto* rejected the argument that the CSRA preserved employees' remedies under pre-existing statutes (there, the Tucker Act and Back Pay Act); that conclusion applies *a fortiori* to the APA, which explicitly states that its provisions are inapplicable if another statute implicitly or explicitly "preclude[s] judicial review." 5 U.S.C. 701(a)(1).

Permitting district court review of employee grievances would disregard Congress's clear intent to channel employment claims through administrative mechanisms before review by the courts of appeals, and thereby foster the creation of a uniform body of federal employment law and eliminate duplicative and inefficient review of agency action in the district courts. Petitioner's reading also would invert the CSRA's basic scheme, by requiring exhaustion for the most serious personnel actions, such as removal, but allowing employees with even minor grievances to proceed directly in district court. The history of the 1994 technical and conforming amendment that added the word "administrative" to Section 7121(a)(1) shows that Congress did not intend to depart in a subtle and circuitous fashion from the well-established

principle that the remedies expressly provided by the CSRA are exclusive and to create a new implicit right to judicial review of employee grievances in district court.

II. The court of appeals correctly affirmed the dismissal of petitioner's constitutional claim, because petitioner was required to present his objections through the remedial avenues established by the CSRA. The CSRA's extensive system of remedies permits resolution of complaints involving alleged constitutional violations, and the MSPB, the FLRA, and the OSC are all able to address and resolve constitutional claims. If petitioner had declined to take a drug test, he would have had several administrative avenues for review of his claim that would have culminated in judicial review. By electing to submit to the tests, he nevertheless retained significant administrative remedies that could have afforded him relief.

The structure of the CSRA, which generally channels all workplace claims through specified administrative bodies and provides for district court review in only a small handful of circumstances not present here, reflects Congress's intent that grievances must be presented for administrative review. Precluding suits brought directly in district court permits the FAA and the FLRA to bring their expertise to bear on the resolution of claims, allows them to resolve many disputes, and produces a useful record for whatever subsequent judicial consideration may be available. If a grievance raises a substantial constitutional claim that remains at the end of the administrative process, the CSRA should not be construed to preclude review in the court of appeals at that point to consider the constitutional issue. But because Congress has made a reasonable categorical judgment that occurrences that do not constitute "major adverse actions" or "personnel actions" are not so significant that they must be cognizable through a formal legal process that includes judicial review, it should be exceedingly rare for such an occasion to arise.

ARGUMENT

I. THE CSRA PROVIDES THE EXCLUSIVE REMEDIES FOR THE EMPLOYMENT CLAIMS OF FEDERAL EMPLOYEES

Petitioner does not dispute that the CSRA and the FAA Personnel Management System provide a comprehensive system of administrative and judicial review of work-related claims, and that Congress omitted from that system an express right to judicial review of grievances such as petitioner's.[5] But petitioner argues that "it does not follow from th[at] fact" (Pet. Br. 12) that the CSRA and the FAA system eliminated the district courts' "pre-existing authority," *id.* at 2, to adjudicate certain work-related claims of federal employees that, according to petitioner, "lay entirely outside" the CSRA. *Id.* at 13. Petitioner contends that whether the CSRA itself provides judicial review is "entirely irrelevant" (*id.* at 20) to the availability of judicial review because the APA, together with "statutory provisions requiring the FAA to use nondiscriminatory and impartial drug-testing procedures," provide a statutory cause of action, Pet. Br. 13 (citing 49 U.S.C. 45104(8)). In making that argument, petitioner focuses narrowly on whether Section 7121(a)(1), standing alone, precludes review, see *id.* at 30-31, rather than considering the re-

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[5] As the court of appeals correctly noted, Pet. App. 4a, "it is actually the FAA Personnel Management System * * * that governs the employment rights of FAA employees," rather than the CSRA alone. Because Congress contemplated that the FAA system would be an adaptation of the CSRA designed to "address[] the unique demands on the agency's workforce," 49 U.S.C. 40122(g)(1), and because the FAA system largely mirrors the CSRA and thus is, "[l]ike the CSRA, * * * 'an integrated scheme of administrative and judicial review,'" Pet. App. 4a (quoting *Fausto*, 484 U.S. at 445), analysis of either scheme yields the same conclusion about the availability of judicial review. Petitioner has not argued that any features of the FAA system would alter the analysis, and indeed, appears to use "CSRA" as shorthand for the FAA's system. See, *e.g.*, Pet. Br. 12-14. In the interests of brevity, this brief will sometimes use "CSRA" to encompass the FAA's system.

medial system as a whole. That argument fundamentally misapprehends the preclusive effect of comprehensive remedial schemes such as the CSRA and is contrary to the great weight of precedent from this Court and others indicating that because of the overall structure of the scheme, as opposed to any one statutory provision standing alone, the only remedies available for employees' grievances are those explicitly set forth in the CSRA.

A. The CSRA Precludes Judicial Review Of Grievances Covered By A CBA

1. In determining whether the remedies created by a statute are exclusive, this Court has long looked to its language, structure, and nature. If a statute "embrac[es] an entire subject, dealing with it in all its phases," the comprehensiveness of the statute demonstrates an intent "to prescribe the only rules which should govern the subject." *Cook County Bank* v. *United States*, 107 U.S. 445, 451 (1883). "In the context of [a] statute's precisely drawn provisions," the omission of an explicit right of review "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); accord, *e.g.*, *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 347 (1984); *Switchmen's Union* v. *NMB*, 320 U.S. 297, 305 (1943).

The Court has applied that principle to hold that the comprehensive nature of the CSRA demonstrates Congress's intent to limit federal employees to the remedies explicitly provided by statute. In *Fausto*, this Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," 484 U.S. at 445, the absence of provision in the CSRA for an excepted-service employee to obtain judicial review of a suspension meant that judicial review was barred and that such employees were precluded from pursuing claims under the Back Pay Act. *Id.* at 448. This Court previously

had recognized a right of action under the Back Pay Act, see *United States* v. *Testan*, 424 U.S. 392, 405-406 (1976), and excepted-service employees had been permitted to bring suits for back pay in the Court of Claims under the Tucker Act before the CSRA's enactment, see, *e.g.*, *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963). But the Court concluded that, in light of the comprehensive nature of the CSRA, it was "evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type [at issue]." *Fausto*, 484 U.S. at 448-449.

The Court applied the same reasoning in declining to infer a private right of action for federal employees to safeguard their statutory right under the CSRA to fair representation. *Karahalios*, *supra*. Noting that the CSRA "expressly provide[s]" employees "an administrative remedy" before the FLRA for a union's breach of its duty, and affords judicial review of the FLRA's decision under 5 U.S.C. 7123(a), this Court declined to infer a judicial right of action in district court against the union. 489 U.S. at 533. Indeed, the Court noted, "[t]o hold that the district court must entertain such cases in the first instance would seriously undermine what we deem to be the congressional scheme, namely to leave the enforcement of union and agency duties under the Act to the General Counsel and FLRA *and to confine the courts to the role given them under the Act*." *Id.* at 536-537 (emphasis added).[6] Consistent with this Court's rulings, the courts of

[6] In *Bush* v. *Lucas*, the Court declined to recognize a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal employee to sue an agency official for damages for alleged constitutional violations in employment. While *Bush* concerned the personnel system that the CSRA replaced, courts of appeals uniformly have held that the reasoning of *Bush* precludes *Bivens* actions under the CSRA.

appeals uniformly have held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985).[7]

2. Petitioner suggests that, even if the CSRA might be read to limit *that* statute's remedies to the administrative procedures it prescribes, there is no reason to believe that Congress disturbed "otherwise available judicial remedies" (Pet. Br. 13), including a suit in district court under the APA. This Court rejected that argument nearly two decades ago. In *Fausto*, a federal employee who had been disciplined filed suit in the Claims Court, asserting that that court had jurisdiction under the Tucker Act, 28 U.S.C. 1491, and that he had a cause of action under the Back Pay Act. See *Fausto*, 484 U.S. at 443. The Federal Circuit agreed, concluding that the "omission" of an explicit provision of the CSRA authorizing judicial review did not "operate[] to repeal the grant of judicial review of [an] issue contained in a different statute."

See, *e.g.*, *Hardison* v. *Cohen*, 375 F.3d 1262, 1264-1265 (11th Cir. 2004); *Saul* v. *United States*, 928 F.2d 829, 836-839 (9th Cir. 1991); *Spagnola* v. *Mathis*, 859 F.2d 223, 226-228 (D.C. Cir. 1988) (en banc).

[7] Accord, *e.g.*, *Formaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.); *Hall* v. *Clinton*, 235 F.3d 202, 203 (4th Cir. 2000); *Gergick* v. *Austin*, 997 F.2d 1237, 1239 (8th Cir. 1993), cert. denied, 511 U.S. 1029 (1994); *Petrini* v. *Howard*, 918 F.2d 1482, 1484-1485 (10th Cir. 1990); *Montplaisir* v. *Leighton*, 875 F.2d 1, 2-3 (1st Cir. 1989); see *Carter* v. *Gibbs*, 909 F.2d 1452, 1456 (Fed. Cir.) (en banc), cert. denied, 498 U.S. 811 (1990), held to be superseded by statute in *Mudge* v. *United States*, 308 F.3d 1220 (Fed. Cir. 2002).

Although the Federal Circuit and Eleventh Circuit in *Mudge* and *Asociacion De Empleados* held that the 1994 amendment to the CSRA (see pp. 24-31, *infra*) created a right of judicial review for grievances covered by a CBA, those opinions did not discuss the analytical framework of *Fausto*, or repudiate the principle that remedies in the CSRA are presumptively exclusive. Even after *Mudge*, the Federal Circuit has continued to hold in other contexts that the CSRA's express remedies are exclusive. See, *e.g.*, *Salinas* v. *United States*, 323 F.3d 1047 (Fed. Cir. 2003).

Fausto v. *United States*, 791 F.2d 1554, 1558 (Fed. Cir. 1986) (on reh'g), rev'd, 484 U.S. 439 (1988). This Court decisively rejected that view, holding that Congress's failure to provide for judicial review of such claims within the CSRA's "comprehensive system for reviewing personnel action" bespoke a "deliberate exclusion" that "prevents respondent from seeking review in the Claims Court under the Back Pay Act." 484 U.S. at 455. Contrary to petitioner's suggestion that Congress must "express[] [its] intent explicitly" when it wants to foreclose judicial review, Pet. Br. 24, this Court made clear that preclusion will be found if it is "*fairly discernible* in the statutory scheme." *Fausto*, 484 U.S. at 452 (emphasis added) (quoting *Block*, 467 U.S. at 351 (quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970))); accord *Morris* v. *Gressette*, 432 U.S. 491, 500-507 (1977).

A straightforward application of *Fausto* compels the conclusion that the CSRA precludes petitioner from suing directly in district court under the APA. Indeed, the basis for preclusion is, if anything, even stronger here than in *Fausto* because the APA (unlike the Back Pay Act and Tucker Act) *explicitly* states that its provisions are inapplicable if another statute "preclude[s] judicial review." 5 U.S.C. 701(a)(1); see 5 U.S.C. 702; *Webster* v. *Doe*, 486 U.S. 592, 599 (1988). Congress expressly provided for a right of judicial review of grievances in only two specific circumstances: when the matter involves an adverse action covered by 5 U.S.C. 4303 or 7512, see 5 U.S.C. 7121(f), and when the matter involves a claim of an unfair labor practice and the arbitral award has been reviewed by the FLRA, see 5 U.S.C. 7123(a). Moreover, when Congress wished to preserve existing remedial schemes *outside* the CSRA, it said so: The CSRA expressly preserves employees' right to bring suit under Title VII of the Civil Rights Act of 1964 and other laws prohibiting discrimination. 5 U.S.C. 2302(d); see *Pers. Mgmt. Sys.* Intro. ¶ VIII(b)(ii). The "highly selective manner in which Congress has provided

for judicial review" (*Switchmen's Union*, 320 U.S. at 305), given the comprehensive and "integrated scheme of administrative and judicial review" that the CSRA created, is a "manifestation of a considered congressional judgment" that employees do not have a general right to judicial review of workplace complaints. *Fausto*, 484 U.S. at 445, 448; accord *Block*, 467 U.S. at 347; *Erika, Inc.*, 456 U.S. at 208.

Permitting employees covered by a CBA to have a direct right of action in district court beyond the context of Title VII and similar statutes would "seriously undermine" two central "structural elements * * * of the CSRA," *Fausto*, 484 U.S. at 449. First, it would conflict with "the Congressionally unambiguous and unmistakable preference for exclusivity of arbitration[, which] is a central part of the comprehensive overhaul of the civil service system provided by the CSRA." *Muniz* v. *United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). As discussed above, see pp. 6-8, *supra*, where an employee is covered by a CBA, the CSRA channels disputes through the negotiated grievance procedure, and either the union or the agency may invoke binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), with subsequent review of the arbitrator's award by the FLRA, 5 U.S.C. 7122(a). Second, a right of district court review would conflict with the "primacy" of the courts of appeals whenever judicial review is available under the CSRA, *Fausto*, 484 U.S. at 449, and would create a "second layer of judicial review" in the district courts, "which Congress meant to eliminate." *Ibid.*; accord *Lindahl*, 470 U.S. at 797. "To hold that the district courts must entertain such cases in the first instance would seriously undermine what [the Court] deem[s] to be the congressional scheme." *Karahalios*, 489 U.S. at 536-537; cf. *Fornaro* v. *James*, 416 F.3d 63, 68 (D.C. Cir. 2005) (Roberts, J.) ("Allowing district court actions challenging how OPM calculates civil service benefits * * * would plainly undermine the whole point of

channeling review of benefits determinations to the MSPB and from there to the Federal Circuit.").

Petitioner cites no authority for his novel contention that the APA independently provides for judicial review of federal employee complaints, and, indeed, there is none. The courts of appeals overwhelmingly have held that federal employees may not obtain judicial review under the APA of employment claims for which the CSRA provides no judicial relief.*

3. Petitioner contends (Pet. Br. 35) that the CSRA should be read to permit judicial review to avoid "unjust and absurd results" that Congress could not have intended. But petitioner adopts a far too encompassing standard of absurdity. The canon of construing a statute to avoid absurdities applies only when the construction yielded by other principles of interpretation is "in a genuine sense[] absurd, *i.e.*, where it is quite impossible that Congress could have intended the result * * * and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *United States DOJ*, 491 U.S. 440, 470-471 (1989) (Kennedy, J., concurring in the judgment); accord *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819). Petitioner's claimed "absurd results" fall far short of that high standard.

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* *E.g.*, *Graham* v. *Ashcroft*, 358 F.3d 931, 932 (D.C. Cir.) (Roberts, J.), cert. denied, 125 S. Ct. 83 (2004); *Tiltti* v. *Weise*, 155 F.3d 596, 601 (2d Cir. 1998); *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); *Ryon* v. *O'Neill*, 894 F.2d 199, 201 (6th Cir. 1990); *Weatherford* v. *Dole*, 763 F.2d 392, 393, 394 (10th Cir. 1985); *Pinar* v. *Dole*, 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Veit*, 746 F.2d at 511; *Billop* v. *Air Force*, 725 F.2d 1160, 1163 (8th Cir. 1984); *Carducci*, 714 F.2d at 174-175; *Broadway* v. *Block*, 694 F.2d 979, 983-984 (5th Cir. 1982). The sole exception predated *Fausto*, see *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984), and is of doubtful continuing validity. See, *e.g.*, *Taydus* v. *Cisneros*, 902 F. Supp. 288, 293 n.3 (D. Mass. 1995) (stating that, in light of *Fausto* and more recent circuit precedent, it is likely that "the First Circuit would not find a cause of action under the APA if faced with the issue today").

a. Petitioner first contends that reading the CSRA to preclude this suit in district court would permit FAA employees who fail or refuse a drug test, and who are subject to major adverse actions as a result, to obtain judicial review of their challenges to the drug test under 5 U.S.C. 7703, while precluding a compliant employee who tests negative from doing so. Pet. Br. 35. Petitioner is correct that an FAA employee who refuses or fails a drug test is potentially subject to various adverse actions, including removal. See *e.g.*, Office of Human Res. Mgmt., DOT, *Drug and Alcohol Testing Guide* at X-1 to X-6 (1994) <http://dothr.ost.dot.gov/ HR_Programs/ Drug_and_Alcohol/revised guide.pdf>. Petitioner is also correct (Pet. Br. 36-37) that an employee facing a major adverse action may appeal to the MSPB and ultimately obtain review from the Federal Circuit. See 5 U.S.C. 4303(e), 7513(d), 7703(a)(1) and (b)(1); 49 U.S.C. 40122(g)(3). By contrast, under the CSRA, a bargaining-unit employee who takes and passes a drug test and suffers no adverse action, but who nevertheless wishes to contest the FAA's decision to test him, must initiate a grievance, which ordinarily culminates in arbitration rather than judicial review. However, there is nothing "paradoxical" or "unfair" (Pet. Br. 37) about that result. It reflects a fundamental aspect of the CSRA scheme in which major adverse actions are subject to more searching review than minor disputes. The scheme reflects that "Congress was concerned about 'the respective costs and benefits' of federal personnel-related litigation, and therefore carefully calibrated the degree of procedural protections available under CSRA to the severity and motivation of the action complained of." *Hubbard* v. *EPA*, 809 F.2d 1, 8 (D.C. Cir. 1987) (citation omitted) (quoting *Bush*, 462 U.S. at 388), aff'd on reh'g *sub nom. Spagnola* v. *Mathis*, 859 F.2d 223, 225 (D.C. Cir. 1988) (en banc); accord *Pinar* v. *Dole*, 747 F.2d 899, 907 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

The interpretation petitioner advocates, on the other hand, would "invert[ ] [the] preference[s]" embodied in the CSRA itself. *Fausto*, 484 U.S. at 450. Under petitioner's view, federal employees could proceed directly to district court to challenge relatively minor employment actions, while employees who were subject to major actions such as removal would be required to employ the CSRA's administrative procedures with judicial review in the Federal Circuit. Because petitioner's interpretation "would give [employees] greater rights" for the review of even trivial complaints "than the CSRA affords for major adverse actions," it must be rejected. *Graham* v. *Ashcroft*, 358 F.3d 931, 935 (D.C. Cir.) (Roberts, J.), cert. denied, 125 S. Ct. 83 (2004); accord *Fausto*, 484 U.S. at 450; *Carducci*, 714 F.2d at 174-175 (Scalia, J.).

b. Petitioner also asserts that it would be "absurd" (Pet. Br. 39) to read the CSRA to give unions the authority to decide whether to include a matter within a CBA's grievance procedures, to choose whether to arbitrate a grievance on behalf of an employee, and to decide whether to seek available review of the arbitration decision. *Id.* at 39 & n.23, 43. Petitioner's labor-union amici incongruously suggest (NTEU Br. 6, 22; AFGE Br. 11) that it is problematic for the CSRA to leave such decisions in the hands of unions, because "[t]he union's interests and those of the individual employee are not always identical or even compatible." AFGE Br. 11 (quoting *McDonald* v. *City of W. Branch*, 466 U.S. 284, 291 (1984)). To support that argument, amici rely exclusively on non-federal employment cases to suggest that, because unions control grievance proceedings, employees should be free to pursue judicial remedies instead of pursuing a grievance. See NTEU Br. 22 (citing *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981)); AFGE Br. 11 (citing *McDonald*).

Those arguments overlook the fundamental distinction between federal and non-federal employment; indeed, in the specific context of judicial review, this Court has rejected

efforts to analogize federal civil-service cases to other labor cases because of differences in the applicable legal regimes. *Karahalios*, 489 U.S. at 534. "[T]he CSRA not only expressly recognizes the [union's] fair representation duty but also provides for its administrative enforcement," *ibid.*, by making breach of that duty an unfair labor practice, see *id.* at 532, which is actionable before the FLRA, 5 U.S.C. 7118, and subject to review and enforcement in the courts of appeal, 5 U.S.C. 7123(a) and (b). Thus, should a union decline to seek arbitration or subsequent FLRA review of a meritorious claim, it would expose itself to an unfair labor practice complaint by the affected employee, see *O'Connell* v. *Hove*, 22 F.3d 463, 471-472 (2d Cir. 1994); *Steadman* v. *Governor, U.S. Soldiers' Home*, 918 F.2d 963, 966 (D.C. Cir. 1990). Also, a union can negotiate with agencies to exclude from the mandatory grievance procedure matters which it believes it would be unlikely to pursue in arbitration, see 5 U.S.C. 7121(a)(2), thus freeing employees to pursue any remedies they have under other provisions of law.

Petitioner contends (Pet. Br. 39) that *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), establishes a general principle, applicable even under the CSRA, that CBAs "cannot waive employees' rights to seek judicial redress for statutory claims." Pet. Br. 39 (emphasis deleted); see NTEU Br. 14 & n.9 (citing *Barrentine*). That case is inapposite. In *Gardner-Denver*, the Court held, in the context of private-sector employment, that a union cannot through a CBA waive an employee's right under Title VII of the Civil Rights Act of 1964 to bring an action in district court based on an allegedly discriminatory employment action. 415 U.S. at 51. To begin with, the CSRA and the FAA system explicitly incorporate the holding of *Gardner-Denver* by expressly preserving an employee's separate statutory right to bring suit under Title VII and other anti-discrimination legislation, 5 U.S.C. 2302(d); *Pers. Mgmt. Sys.* Intro. ¶ VIII(b)(ii); 5 U.S.C. 7702,

7703(b)(2), 7121(d). The statute on which petitioner relies here, by contrast, provides standards for the conduct of alcohol and drug tests by the FAA, but confers no right of action. See 49 U.S.C. 45101 *et seq.* And the CSRA itself does not confer or preserve any such right of action.

In any event, *Gardner-Denver* explicitly turned on the "distinctly separate nature" of contractual rights guaranteed by CBAs and statutory rights created by Congress. *Gardner-Denver*, 415 U.S. at 50; accord *Barrentine*, 450 U.S. at 737. By contrast, "federal employment does not rest on contract in the private sector sense," *Karahalios*, 489 U.S. at 535, and for that reason, the courts of appeals repeatedly have held *Gardner-Denver*'s reasoning is "misplaced" in the context of federal employment. *Carter* v. *Gibbs*, 909 F.2d 1452, 1457 (Fed. Cir.), cert. denied, 498 U.S. 811 (1990); accord *Abbott* v. *United States*, 144 F.3d 1, 5 (1st Cir. 1998); *O'Connell*, 22 F.3d at 471. Under the CSRA, employees' statutory rights are not distinct from their contractual rights, but rather both "are consolidated within the four corners of the collective [bargaining] agreement: Congress defined a 'grievance' to include contractual disputes *and* 'any claimed violation . . . of any law,'" *Carter*, 909 F.2d at 1457 (emphasis added) (quoting 5 U.S.C. 7103(a)(9)(C)); *see O'Connell*, 22 F.3d at 471, reflecting an intent that statutory claims would be subject to grievance procedures and binding arbitration. Cf. *Barrentine*, 450 U.S. at 740 (holding that Fair Labor Standards Act (FLSA) claims are not barred by prior submission to CBA procedures, because "no other forum for enforcement of statutory rights is referred to or created by the statute").

B. The 1994 Amendments To The CSRA Did Not Confer A Right To Judicial Review Of Grievances Covered By A CBA

Petitioner and his amici contend that Congress amended Section 7121(a)(1) in 1994 to "override," Pet. Br. 33, the en

banc Federal Circuit's holding in *Carter*, *supra*, that the CSRA provides the exclusive procedures for resolution of employee grievances. See NTEU Br. 11-19; AFGE Br. 23-26. To hold otherwise, petitioner contends, would render the term "administrative" in Section 7121(a)(1) "entirely superfluous." Pet. Br. 28. That argument lacks merit. As the court of appeals correctly concluded, Pet. App. 9a-10a, Congress's 1994 technical amendment to Section 7121(a)(1) did not reverse the longstanding and uniform interpretation by the federal courts and create in a remarkably subtle and circuitous manner a new and unprecedented right to judicial review of federal employee grievances.

1. In *Carter*, the en banc Federal Circuit held that federal employees covered by a CBA could not bring suit in district court for overtime pay under the Fair Labor Standards Act, and that "the procedures [set out in the CBA] * * * [were] the exclusive procedures for resolving grievances which fall within its coverage." 909 F.2d at 1454 (quoting 5 U.S.C. 7121(a)(1) (1988)). Citing *Lindahl*, *Bush*, *Fausto*, and *Karahalios*, the court declined to recognize a right to judicial review because "Congress narrowly circumscribed the role of the judiciary in its carefully crafted * * * scheme" by providing for judicial review only in certain instances. *Id.* at 1456. At the time of the 1994 amendment, the *Carter* decision was "widely adopted" (Pet. Br. 33) by other federal courts, which uniformly held that the CSRA precludes employees subject to a CBA's grievance procedures from bypassing those procedures and seeking judicial review.[9] Consistent with *Fausto* and *Karahalios*, the courts of appeals without exception also had held more generally that the CSRA precludes judicial review of various statutory and non-statutory

[9] See, *e.g.*, *O'Connell*, *supra*; *Johnson* v. *Peterson*, 996 F.2d 397, 398 (D.C. Cir. 1993); *Saul*, 928 F.2d at 842 n.23; see also *Abbott*, 144 F.3d at 2, 6 n.4 (discussing *Carter*); *Parker* v. *King*, 935 F.2d 1174, 1176, 1178 (11th Cir. 1991) (same).

claims unless the Act expressly provides for such review.[10] See generally *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (presuming congressional awareness of lower-court decisions).

2. Petitioner contends that, by adding the single word "administrative" to Section 7121(a)(1) in 1994, Congress, "without explanation" (Pet. Br. 34), overruled the uniform holdings of at least four federal courts of appeals, see p. 25 & n.9, *supra*, and conferred district court jurisdiction over employee grievances. Petitioner does not argue that the 1994 amendment *explicitly* created a right of judicial review; rather, he argues that the amendment "strongly suggests" that Congress intended to create a right of judicial review. Pet. 14. But it was clearly established in 1994 that only an *express* statutory provision would create a right of judicial review because "the CSRA's 'integrated scheme of administrative and judicial review' foreclose[s] an implied right to [district court] review." *Karahalios*, 489 U.S. at 536 (quoting *Fausto*, 484 U.S. at 445). Indeed, the legislative history of the bill that contained the 1994 amendment clearly indicates that Congress was aware that it would be "necess[ary] [to] *explicitly stat[e]* when Congress intends to give employees a choice of remedies." *Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office & Civil Serv.*, 103d Cong., 1st Sess. 22 (1993) (statement of Robert M. Tobias, President, NTEU) (emphasis added). There is thus no reason to believe that Congress would have thought in 1994 that simply inserting the word "administrative" in Section 7121(a)(1) would

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[10] See, *e.g.*, *Berrios* v. *Department of the Army*, 884 F.2d 28, 31-32 (1st Cir. 1989); *O'Connell*, 22 F.3d at 470-471; *Pinar*, 747 F.2d at 910-911; *Broadway*, 694 F.2d at 983-984; *Jones* v. *TVA*, 948 F.2d 258, 265 (6th Cir. 1991); *Schwachta* v. *Curtis*, 752 F.2d 1257, 1259-1260 (7th Cir. 1985); *Premachandra* v. *United States*, 739 F.2d 392, 393-394 (8th Cir. 1984); *Veit*, 746 F.2d at 510-511; *Petrini*, 918 F.2d at 1484-1485; *Broughton* v. *Courtney*, 861 F.2d 639, 644 (11th Cir. 1988); *Harrison* v. *Bowen*, 815 F.2d 1505, 1515 (D.C. Cir. 1987).

create a new right to judicial review of matters subject to CBA grievance procedures. See *Karahalios*, 489 U.S. at 536 (noting that because "Congress undoubtedly was aware" of the standard for recognizing implied private rights of action, "we would expect to find some evidence of that intent in the statute or its legislative history").

Furthermore, to read Section 7121(a)(1) implicitly to authorize judicial review would produce a significant anomaly. Federal agencies have established their own grievance procedures for employees who are not covered by CBAs and therefore are not covered by the grievance procedures contained in such agreements. See 5 C.F.R. 771.201(a) (1995) (requiring such grievance procedures).[11] Petitioner's interpretation of amended Section 7121 would permit bargaining-unit employees to avoid the grievance procedures and present their grievances directly to the courts. But because Section 7121 applies only to grievance procedures established by CBAs, federal employees who are not subject to CBAs would remain limited to pursuing their agencies' internal grievance procedures and would be precluded from obtaining judicial review. That preferential treatment of employees subject to CBAs makes no sense. There is no reason to believe that Congress intended to grant federal employees who have the benefit of union representation and arbitration a right to bypass the procedures that are the product of collective bargaining and go directly to court—even for minor disputes—while at the same time limiting other federal employees to grievance procedures over which they had no say in adopting.

3. Petitioner contends (Pet. Br. 28) that the "most natural construction of the phrase 'exclusive administrative proce-

[11] The Office of Personnel Management rescinded the regulations governing agency administrative grievance procedures to permit agencies greater flexibility in the establishment of grievance systems. 60 Fed. Reg. 47,039 (1995). But each agency was required to maintain its previously established grievance systems until the system was either modified or replaced. 5 C.F.R. 771.101.

dures' is one that recognizes the existence, and continued vitality, of *non*-administrative procedures." But petitioner's suggested reading is not the most natural one and certainly is not necessary to avoid "render[ing] the word ['administrative'] entirely superfluous." *Ibid.* The relevant "[e]xcept[ed]" subsections—(d), (e), and (g)—all provide for a choice of *other administrative* remedies, often including subsequent judicial review. Therefore, Section 7121(a)(1)'s reference to a general rule of exclusivity for the administrative process of the CBA, subject to exceptions for situations in which the statute provides an alternative administrative process, makes perfect sense as a description of available administrative remedies, without creating any implications for the wholly separate question of judicial review. Also, before the amendment, Section 7121(a)(1)'s statement that the CBA's grievance procedure constituted the "exclusive procedure[] for resolving grievances which fall within its coverage" was, if construed to include the "procedure" of judicial review, in tension with Section 7121(f)'s explicit provision for judicial review of arbitrator awards in grievance proceedings involving adverse employment actions covered by 5 U.S.C. 4303 and 7512, and "similar" matters under other personnel systems. The amendment conformed subsections 7121(a)(1) and (f) by clarifying that subsection (a)(1)'s exclusive procedures provision did not implicitly compromise the ability of employees to seek judicial review in the instances specified in subsection (f), even where the employee *did* elect to invoke the grievance procedures under the CBA. See Gov't Br. 19. That rather modest function, unlike the transformative consequences attributed to the addition of a single word by petitioner, is perfectly consistent with the amendment's status as a technical correction.[12] See *Director of Rev.* v. *CoBank ACB*, 531 U.S.

[12] This Court has indicated that the canon against interpreting a word as "surplusage" has little weight in construing technical amendments. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 & n.6 (1980).

316, 323-324 (2001) (stating that "it would be surprising, indeed," if Congress had made "a radical—but entirely implicit" change in a technical and conforming amendment).

4. The legislative history of the 1994 amendment confirms that Congress did not intend to create a new right of judicial review of grievances. The 1994 amendment was enacted as a provision of H.R. 2970 during the 103d Congress. As passed by the House of Representatives, the bill contained three provisions of note. First, in a subsection entitled "choice of remedies provision *not* involving judicial review," the bill proposed a new subsection 7121(g) to provide a choice of remedies for employees claiming prohibited personnel practices not involving discrimination. H.R. 2970, 103d Cong., 2d Sess. § 5(e) (Oct. 3, 1994) (emphasis added); 140 Cong. Rec. 27,360 (1994). Second, in a subsection entitled "choice of remedies provision *involving* judicial review," the bill proposed adding a new section to the CSRA permitting employees to bring suit in district court to challenge a personnel action taken in retaliation for whistleblowing. H.R. 2970, § 5(c) (emphasis added); 140 Cong. Rec. at 27,359. Third, a separate provision of the bill contained "conforming amendments" that proposed inserting the word "administrative" in Section 7121(a)(1) and included new subsection (g) among the exceptions to the section's administrative exclusivity provision. H.R. 2970, § 2(b)(2); 140 Cong. Rec. at 27,358.

The Senate removed the provision permitting district court review of personnel actions involving whistleblowers, but retained the other two provisions. Both of those provisions were contained in the same section, which was entitled "authorities relating to arbitrators and choice of remedies not involving judicial review." See H.R. 2970, 103d Cong., 2d Sess. § 9 (Oct. 7, 1994); 140 Cong. Rec. at 29,351. Congress enacted the Senate version of the bill. See 108 Stat. 4365.

That history refutes any suggestion that by adding the word "administrative," Congress wished to create a general

right for employees to seek judicial review of grievances covered by a CBA. Congress deleted the only provision of the bill that explicitly would have permitted initial district court review. And in describing the enacted bill, its sponsor, Representative McCloskey, noted that the Senate had "delet[ed] the provision * * * allowing an action de novo in a Federal court" for whistleblower complaints (140 Cong. Rec. at 29,352; see 139 Cong. Rec. 19,616 (1993)), with no suggestion that the bill's amendment to Section 7121(a)(1) authorized federal court review. McCloskey also noted a provision of the bill that permitted "[j]udicial review" of certain disciplinary actions taken by arbitrators under a newly created provision, see 140 Cong. Rec. at 29,353 (discussing 5 U.S.C. 7121(b)(2)(B)), but tellingly said nothing to indicate that the bill created a general right for employees to seek review of other grievances in district court. Moreover, the legislative history of the enacted bill clearly states that one provision was adopted to overturn the Federal Circuit's decision in *Clark* v. *Department of the Army*, 997 F.2d 1466 (1993), cert. denied, 510 U.S. 1091 (1994), concerning the burden of proof in whistleblower cases. See H.R. Rep. No. 769, 103d Cong., 2d Sess. 14-15 (1994); 140 Cong. Rec. at 29,352-29,353 (statement of Rep. McCloskey). But that legislative history is silent about any intent to overrule *Carter*.

Petitioner (Br. 32-35) and amicus NTEU (Br. 17-19) contend that the legislative history of *another* bill considered earlier in the 103d Congress, H.R. 2721—which was *not* enacted—demonstrates that Congress added the word "administrative" to Section 7121(a)(1) to overrule *Carter*. As petitioner notes, Br. 33, the report on H.R. 2721, which was reported by a different committee in the House, reflected an intent to overrule *Carter* and permit employees to bring suit directly in federal court. See H.R. Rep. No. 599, 103d Cong., 2d Sess. Pt. 1, at 56 (1994). Because both the unenacted H.R. 2721 and the enacted H.R. 2970 proposed adding the word

"administrative" to Section 7121(a)(1), petitioner contends (Br. 33) that the enacted bill should be read to have the same purpose and effect as the unenacted H.R. 2721. That contention is mistaken.

This Court has cautioned against inferring the intent of Congress from a bill that was not enacted. See *United States* v. *Craft*, 535 U.S. 274, 287 (2002). Caution is particularly warranted here because, although both bills would have added the word "administrative" to Section 7121(a)(1), that is where the similarities end. The unenacted bill would have given employees broad access to district court to bring employment-related discrimination claims. H.R. 2721, 103d Cong., 2d Sess. § 2(b)(5) (Aug. 19, 1994); *id.* § 3(a)(1)(B); *id.* § 4(a), (b). Indeed, the section of the bill that added the word "administrative" *also* amended Section 7121 explicitly to provide employees with a right to pursue in district court discrimination claims covered by a CBA's grievance procedure. H.R. 2721, § 4(a)(2). None of those provisions, however, was contained in the enacted bill. Cf. 140 Cong. Rec. at 29,352 (statement of Rep. McCloskey) (noting that the enacted bill was "far less comprehensive" than H.R. 2721). To the extent that this unenacted text is relevant at all, it demonstrates that when Congress intends to add judicial remedies to the comprehensive CSRA regime, it does so expressly, not elliptically. It therefore would be inappropriate to rely on the legislative history of the unenacted bill. See *HUD* v. *Rucker*, 535 U.S. 125, 133 n.4 (2002).[13]

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[13] In any event, an intent to overrule *Carter* does not imply an intent to permit judicial review of any claim that could be brought under a CBA's grievance procedures. *Carter* held that the CSRA barred a federal employee from bringing a statutory cause of action under the FLSA, 29 U.S.C. 216(b), if the grievance was covered by a CBA. 909 F.2d at 1458. Petitioner cites nothing in the legislative history of the two bills suggesting that even the proponents of overruling *Carter* intended to extend judicial review to the myriad grievances for which there is no other specific statutory cause of action, such as the one at issue here. If anything, the report on the unenacted bill suggests a narrower

II. PETITIONER'S CONSTITUTIONAL CLAIMS MUST BE RAISED THROUGH THE PROCEDURES PRESCRIBED BY THE CSRA

In addition to his claim that the FAA's substance testing of him violates provisions of Title 49 governing employee testing, petitioner also has argued, during the course of this litigation, that the FAA's testing of him violated an ever-expanding number of his constitutional rights. Petitioner does not, however, challenge the validity of the FAA's random drug-testing program under the Constitution. He contends only that the drug-testing program was misapplied to him because he was selected for testing more often than other employees.[14]

Consistent with the views of the majority of circuits and binding circuit precedent, see *Saul* v. *United States*, 928 F.2d at 843,[15] the court of appeals below held that petitioner could

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intent to preserve only specific statutory causes of action of the sort at issue in *Carter*. See H.R. Rep. No. 599, Pt. 1, at 56 (emphasizing that *Carter* "denied employees the right to judicial review of claims under the Fair Labor Standards Act").

[14] In the district court and court of appeals, petitioner alleged that the testing violated 49 U.S.C. 5331(d)(8) and that the September 2002 make-up test violated his First Amendment right to privacy. See, *e.g.*, J.A. 7, 13; Pet. C.A. Br. 18, 19, 21, 22. After petitioner obtained counsel, he alleged in his certiorari petition that the FAA had "violated 49 U.S.C. 45104(8) and his constitutional right of privacy." Pet. 2. In his reply brief at the certiorari stage, petitioner alleged for the first time that the government had violated "the First, Fourth, and Fourteenth Amendments." Pet. Reply Br. 6. Finally, in his merits brief, petitioner alleges that the government's conduct violated the "Fourth, Fifth, and First Amendments to the Constitution." Pet. Br. 17.

[15] Accord *Dotson* v. *Griesa*, 398 F.3d 156, 180 (2d Cir. 2005), petition for cert. pending, No. 04-1276; *Lombardi* v. *SBA*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Berrios*, 884 F.2d at 31; *Hallock* v. *Moses*, 731 F.2d 754, 757 (11th Cir. 1984); see *Pinar*, 747 F.2d at 909-912 (holding that CSRA precludes equitable relief, at least where constitutional injury is not major). But see *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (3d Cir. 1995) (holding that CSRA did not foreclose suit seeking equitable relief for constitutional grievance); *Steadman*, 918 F.2d at 967 (same, but requiring administrative exhaustion before suit could be brought).

not bring an action directly in district court to obtain equitable relief based on such a grievance because the CSRA does not provide for such a suit. Pet. App. 10a. The court of appeals therefore correctly affirmed the dismissal of petitioner's complaint in its entirety, including his assertion of a constitutional violation, because petitioner was required to present his objections through one of the several remedial avenues established by the CSRA. Those statutorily prescribed procedures are fully capable of affording relief, and several of them expressly provide for judicial review.

Petitioner's failure to present his grievance through the statutorily prescribed procedure is a sufficient basis to affirm, and affirmance on that ground would avoid this Court's having to resolve definitively the correct forum for bringing a properly presented constitutional claim. Although the presumption in favor of judicial review of constitutional claims would require judicial review of a properly exhausted constitutional claim, the proper forum for such a claim raises a difficult question. Although the entire structure of the CSRA would seem to favor review in the court of appeals, and this Court has applied a presumption in favor of court of appeals review, *Lindahl*, 470 U.S. at 797, the text of the relevant statutory provision would appear to include certain constitutional claims within the exclusion from the court of appeals' otherwise plenary jurisdiction. Allowing court of appeals, as opposed to district court, review would require inferring a limitation to the exception for constitutional claims. The alternative would be to allow the exhausted claims to be brought in district court. Although neither approach is entirely satisfactory—presumably because Congress did not avert to the specific problem of such claims—the former view seems more consonant with the overall structure of the CSRA.

A. The CSRA Provides Comprehensive Procedures For Resolving Employment Disputes Of Federal Employees, Including Those Raising Constitutional Issues

The "remedies currently available" under the CSRA are "elaborate" and "comprehensive," and they were fashioned "with careful attention to conflicting policy considerations." *Bush*, 462 U.S. at 388. That extensive system of remedies is available to address complaints involving alleged constitutional violations. In *Bush*, for example, this Court recognized that constitutional claims (there, that an employee had been demoted in retaliation for the exercise of First Amendment rights) could properly be raised in an appeal of an adverse action to what is now the MSPB. See 462 U.S. at 385-387 & n.33. The FLRA likewise considers constitutional issues in its review of decisions by arbitrators on grievances presented to them under a CBA. See, *e.g.*, *Laborers' Int'l*, 60 F.L.R.A. 202, 203, 207-208 (2004). For claims of discrimination on the basis of race, sex, religion, and other grounds that would violate the Constitution, the CSRA provides or preserves separate statutory remedies, and those provisions bar other causes of action for such claims. *Brown* v. *GSA*, 425 U.S. 820 (1976). Finally, the Special Counsel is responsible for seeking corrective action from an agency or the MSPB in response to complaints by employees concerning personnel actions taken against them without "proper regard for their privacy and constitutional rights," 5 U.S.C. 2301(b)(2); *Pers. Mgmt. Sys.*, Intro. ¶ VII(b), or in violation of any law, rule or regulation that implements or directly concerns the merit system principles set forth in Section 2301—provisions that often serve to safeguard the constitutional interests of federal employees. See 5 U.S.C. 2302(b)(12); *Pers. Mgmt. Sys.* Intro. ¶ VIII(a)(ix).

The CSRA's remedial procedures were fully available to address petitioner's objections to taking drug tests. Indeed, it would not even have been necessary in those proceedings to

decide whether the selection of petitioner for a test violated the Fourth Amendment or some other constitutional provision, because protection at least as broad as that provided by the Constitution is afforded by the statutory provision on which petitioner relies, 49 U.S.C. 45104(8), which requires the agency to select employees for drug or alcohol tests "by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." If petitioner had declined to take a drug test, and if he had then been subjected to removal, suspension of more than 14 days, or reduction in pay or grade as a result, he could have relied on either Section 45104(8) or the Constitution as a defense in a hearing before the MSPB or on judicial review. See, *e.g.*, *Garrison*, 67 M.S.P.R. 154, 158 (1995); cf. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 216 (1994) (mine operator could have challenged agency order by refusing to comply and raising objections in subsequent enforcement proceeding). Even if the discipline selected had not been a major adverse action, petitioner could have challenged it by filing a complaint with the OSC, charging that the discipline constituted a prohibited personnel practice because it was taken in violation of 49 U.S.C. 45104(8) or without regard to his privacy or constitutional rights.[16] If the OSC sought corrective action, he would have had a right to seek judicial review of any resulting decision by the MSPB. 5 U.S.C. 1214(c), 7703(b). Indeed, OSC could have sought a

[16] Petitioner contends that OSC lacks jurisdiction over allegations of prohibited personnel practices of FAA employees. Pet. Br. 4-5 n.4, 11 n.10. As discussed in our brief at the petition stage (at 25 n.10), that claim lacks merit because 49 U.S.C. 40122(g)(2)(H) explicitly makes the CSRA's OSC enforcement provisions applicable to the FAA system. See Pet. App. 10a. Although, previously, an ambiguous statement on the OSC website suggested that its jurisdiction over FAA employees was limited to whistleblower claims, see Pet. Br. 4-5 n.4 (citing http://www.osc.gov/ppp.htm#q2 (last visited Aug. 28, 2005)), the website has since been corrected. See http://www.osc.gov/ppp.htm#q2 (last visited Oct. 17, 2005).

stay of the disciplinary action pending its investigation, see 5 U.S.C. 1214(b)(1)(A)(i), thus permitting petitioner to challenge a proposed drug test without requiring him to submit to testing or suffer sanctions.[17]

Petitioner submitted to the tests, and he thereby limited his avenues for pursuing judicial review. Even so, the CSRA afforded him a remedy. The grievance procedures provided under 5 U.S.C. 7121(a)(1) and the CBA remained available to challenge the FAA's selection of him for testing. The grievance procedure is well suited to the nature of petitioner's claim. Petitioner's sole explicit request for relief in district court was to require the FAA to conduct "a survey of similarly-situated employees to establish an average number of selections for substance-testing," J.A. 11, and, if the survey showed that "testing is not random," to order an "appropriate" remedy. *Ibid.* The information petitioner sought could have been developed during the grievance and arbitration process. The result might then have been either to reassure petitioner that his concerns about disproportionate testing were unfounded, to give the FAA information to help it correct any deficiencies on its own or in consultation with the

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[17] Citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), petitioner contends that plaintiffs should be able to challenge a regulatory scheme in court without having to risk sanctions. Pet. Br. 38-39, 46. But in *Thunder Basin*, this Court rejected the contention that judicial review must be available before an agency imposes sanctions. See 510 U.S. at 217-218. In any event, *Abbott Laboratories* only addressed the issue of the appropriate timing for APA review in a situation in which the APA concededly applied. The Court concluded in that case that the specific provisions of the Federal Food, Drug, and Cosmetic Act did not preclude resort to the APA's "generous review provisions," 387 U.S. at 141, because the Act was "designed to give an additional remedy and not to cut down more traditional channels of review." *Id.* at 142; see *Thunder Basin*, 510 U.S. at 212. By contrast, this Court has already concluded that the CSRA was meant to preclude "remedies that had been available before the enactment of the CSRA," *Fausto*, 484 U.S. at 444, and the CSRA forecloses APA review of petitioner's claims.

union, or in any event to furnish a factual basis for a decision by the arbitrator and the FLRA.

The CSRA's comprehensive remedial scheme thus furnished petitioner with a range of options tailored to different circumstances. That remedial scheme is entirely reasonable, both in its general application and in the context of this case.

B. Petitioner May Not Circumvent The CSRA's Mechanisms By Couching His Complaint In Constitutional Terms And Filing Suit Directly In District Court

Rather than pursuing one of the available avenues for relief under the CSRA, petitioner brought this suit directly in district court, wholly outside the CSRA's remedial framework. As explained in Point I, *supra*, the CSRA's comprehensive framework precludes such a suit in district court. Petitioner cannot avoid that preclusion simply by casting his grievance in constitutional terms.

This Court repeatedly has recognized that "government offices could not function if every employment decision became a constitutional matter," *NTEU* v. *Von Raab*, 489 U.S. 656, 666 (1989); accord *City of San Diego* v. *Roe*, 125 S. Ct. 521, 525 (2004); *Connick* v. *Myers*, 461 U.S. 138, 143 (1983), and it is a simple matter to recast minor administrative disputes in constitutional terms. See, *e.g.*, *Eastern Bridge, LLC* v. *Chao*, 320 F.3d 84, 91 (1st Cir. 2003); *Ingram* v. *Secretary of HHS*, 830 F.2d 67 (6th Cir. 1987) (per curiam). Permitting an employee to proceed directly to court with an employment-related grievance involving even minor matters, simply because it has been couched in constitutional terms, would "allow [employees] to circumvent the statutory review process with an agile game of word play," *Eastern Bridge*, 320 F.3d at 91, and upset the balance Congress struck between "the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445.

1. This Court will "find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin*, 510 U.S. at 207 (quoting *Block*, 467 U.S. at 351). "Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Ibid.* (citation omitted). In *Thunder Basin*, for example, this Court held that the Federal Mine Safety and Health Amendments Act of 1977 precluded a pre-enforcement challenge in district court to an order issued by the Mine Safety and Health Administration (MSHA), even though the Act did not expressly preclude such a challenge. In reaching that conclusion, the Court emphasized several factors: (1) that the Act established a "detailed structure" for review of enforcement actions commenced by MSHA if a mine operator refuses to comply with such an order, including a right to a hearing by an expert commission and judicial review in the court of appeals, 510 U.S. at 207-208; (2) that the statutory claims fell within the commission's expertise, *id.* at 214; (3) that the administrative process afforded meaningful review because the commission could address even constitutional questions, *id.* at 215; and (4) that in any event, constitutional claims could be considered on review of the commission's decision in the court of appeals. *Ibid.* The Court concluded that to permit a party to "evade the statutory-review process" would be "inimical to the structure and the purposes of the Mine Act." *Id.* at 216.

It would likewise be "inimical to the structure and purpose" of the CSRA to allow an action in district court in the first instance. Congress intended to channel *all* claims of federal employees through one of the procedural mechanisms it established, and to do so as a prerequisite to whatever judicial review may be available. The CSRA provides for suits in district court in only a small handful of cases, principally in-

volving claims of discrimination unlawful under other federal statutes (most of which themselves require exhaustion of administrative remedies before filing suit). See pp. 4-8, *supra*. Petitioner himself acknowledges that the CSRA generally functions "as a jurisdiction-channeling statute," Pet. Br. 26 n.17 (emphasis deleted), directing that claims be considered by specified administrative bodies and expressly providing only limited judicial review, ordinarily in the courts of appeals. See *Fausto*, 484 U.S. at 449. As relevant here, the CSRA provides a "detailed structure," *Thunder Basin*, 510 U.S. at 207, for reviewing employee grievances through grievance procedures, binding arbitration, and appeal to the FLRA. 5 U.S.C. 7121(a) and (b), 7122(a)(1).

Petitioner errs in contending that "nothing in the overall structure of the CSRA imposes a requirement that employees exhaust negotiated grievance procedures." Pet. Br. 41. The statutory directive that the negotiated procedure be the "exclusive administrative procedure[]" for bargaining-unit employees to pursue their grievances, 5 U.S.C. 7121(a)(1), reflects Congress's judgment that the grievance and arbitration process is particularly well suited to address those claims, and it refutes the notion that Congress intended to permit employees to pursue their grievances in the first instance by other means nowhere mentioned in the Act. Cf. *Muniz*, 972 F.2d at 1309 (noting Congress's "unambiguous and unmistakable preference for exclusivity of arbitration"). Indeed, this Court has observed that "[p]erhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive." *McKart* v. *United States*, 395 U.S. 185, 193 (1969). Requiring presentment of complaints through one of the CSRA's remedial mechanisms, such as grievance and arbitration, also furthers Congress's intent to channel review of federal employment decisions to specified administrative bodies, in order to promote the development of "a unitary and

consistent Executive Branch position." *Fausto*, 484 U.S. at 449. Thus, the text and structure of the CSRA demonstrate that "Congress plainly did not want employees to take their grievances straight to court when they could have pursued the negotiated procedure instead." *Suzal* v. *Director, USIA*, 32 F.3d 574, 587 (D.C. Cir. 1994) (Williams, J., concurring); accord *Steadman*, 918 F.2d at 967-968.

Precluding such suits in district court also serves the "twin purposes" of the doctrine of exhaustion of administrative remedies: "protecting administrative agency authority and promoting judicial efficiency." *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992). See generally *McKart*, 395 U.S. at 193-195. With respect to grievance and arbitration, the FAA and ultimately the FLRA, not the courts, "have primary responsibility for the programs that Congress has charged them to administer," *McCarthy*, 503 U.S. at 145, and the requirement that grievances be presented to them rests on "the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes * * * before it is haled into federal court," *ibid*. Preclusion of immediate review in district court also promotes judicial efficiency, because "[a] favorable agency decision * * * may moot" the claim. *Christian* v. *New York Dep't of Labor*, 414 U.S. 614, 622 (1974). And even when the administrative process does not resolve the controversy, it "may produce a useful record for subsequent judicial consideration." *McCarthy*, 503 U.S. at 145.

The foregoing principles "apply with particular force * * * when the agency proceedings * * * allow the agency to apply its special expertise." *McCarthy*, 503 U.S. at 145; *McKart*, 395 U.S. at 194. Here, channeling petitioner's complaint through the grievance process would have allowed the FAA, at the initial stage, to interpret 49 U.S.C. 45104(8) and its drug-testing plan, and draw on its expertise in administering the program. Proceeding to arbitration would have furthered

the CSRA's purpose of relying on that established method of resolving employment disputes and allowed the union to draw on its own experience in representing employees in the unit. And if the matter were not resolved in arbitration, the "plain language [of the CSRA] evinces an intent that the FLRA shall pass upon issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues." *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (per curiam); accord *ATF* v. *FLRA*, 464 U.S. 89, 97 (1983).

2. Contrary to the suggestions of amicus, see AFGE Br. 8, the constitutional nature of petitioner's grievance does not militate against channeling it through the statutorily-mandated grievance and arbitration procedure. Even if the ultimate resolution of constitutional claims traditionally has been the province of the courts, it does not follow that administrative bodies should not resolve cases in which constitutional claims are raised. "On the contrary, * * * the very fact that constitutional issues are put forward constitutes a strong reason" for requiring administrative review, *Aircraft Equip. Corp.* v. *Hirsch*, 331 U.S. 752, 772 (1947); accord *Public Util. Comm.* v. *United States*, 355 U.S. 534, 539-540 (1958) (collecting authorities); 2 R. Pierce, Jr., *Administrative Law Treatise* § 15.5, at 1005 (4th ed. 2002), because the administrative process may eliminate the necessity of deciding constitutional questions by permitting an agency to resolve disputes on other grounds or in ways that avoid or minimize constitutional concerns. *E.g.*, *Ledford* v. *West*, 136 F.3d 776, 780-781 (Fed. Cir. 1998); *Meredith Corp.* v. *FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987). That course also gives the agency an opportunity to analyze the case and develop facts relevant to the claims, and thereby furnish a record for whatever judicial review may be available. *Meredith Corp.*, 809 F.2d at 872; accord *NTEU* v. *FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993).

Here, moreover, the CSRA grievance procedure in fact provides "meaningful review" of constitutional issues involved

in an employee's grievance. *Thunder Basin*, 510 U.S. at 207. The FLRA considers constitutional claims in reviewing arbitration awards (see p. 34, *supra*), and it is empowered to "take such action * * * as it considers necessary" if it determines that the award is deficient. 5 U.S.C. 7122(a). And as noted above, the FLRA could resolve a complaint such as petitioner's by applying 49 U.S.C. 45104(8), which subsumes constitutional standards.

3. Petitioner and his amicus are mistaken (Pet. Br. 1, 17, 18-19; NTEU Br. 5, 10, 26) that this Court's decision in *Von Raab*, demonstrates that district courts may afford judicial review to claims that are "nearly identical" to petitioner's. Pet. Br. 17. To begin with, "[t]he issue [the Court] confront[s] today simply was not presented" (*United States* v. *Booker*, 125 S. Ct. 738, 754 (2005)) in *Von Raab*, because the parties did not raise before this Court the issue of the district court's authority to review such claims in the first instance, and the Court's failure sua sponte to address implied preclusion of district court review under the CSRA does not reflect any judgment on that subject. More fundamentally, petitioner's constitutional claims are quite different from those raised in *Von Raab*. There, this Court upheld the Customs Service's program of non-random drug testing for employees against a union's facial challenge under the Fourth Amendment. 489 U.S. at 677; see J.A. 3-9, *Von Raab*, *supra* (No. 86-1879). The Court has sometimes allowed a broad programmatic challenge to be brought outside of the special statutory procedures Congress established to resolve individual claims. See, *e.g.*, *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-494, 498 (1991); *Bowen* v. *Michigan Acad.*, 476 U.S. 667, 675-676 (1986).

Petitioner does not challenge the constitutionality of either the statute mandating testing of FAA employees in safety-sensitive positions (49 U.S.C. 45102(b)) or the FAA's program implementing that statute. He does not even dispute

that, by their terms, the FAA's procedures require random testing. See Pet. Br. 7-8. Rather, he alleges that the agency's *testing of him* violated both statutory and constitutional requirements, and he seeks relief *only with respect to himself*. See J.A. 11, 18-19. Petitioner's claim thus clearly is a "complaint * * * concerning a[] matter relating to [his] employment" and thus falls within the statutory definition of "grievance." 5 U.S.C. 7103(a)(9)(A). Accordingly, this case is wholly different from *Von Raab* and other cases presenting broad facial challenges, and is squarely within the scope of the CSRA's exclusive review provisions.

4. Petitioner errs in contending (Pet. Br. 41) that it would be inappropriate to preclude district court review and require resort to an administrative process when "the only administrative remedy is an informal grievance process." The statutorily mandated process under the CSRA/FAA system, while less formal than district-court litigation, establishes detailed procedures that provide for a prompt hearing, a right of representation, and a prompt written decision. *Pers. Mgmt. Sys.* Ch. III, ¶ 4(f). The negotiated grievance procedure under the CBA likewise provides for a right of representation, see J.A. 23, a reasonable amount of time to present the claim, a hearing, and prompt written resolution. J.A. 23-24. In any event, this Court has rejected the proposition that exhaustion is necessary only when procedures are formal, noting that even informal proceedings may "filter out" some claims and "foster better-prepared litigation once a dispute did move to the courtroom" by producing a useful record. *Booth* v. *Churner*, 532 U.S. 731, 737 (2001).

Petitioner likewise errs in arguing (Pet. Br. 43) that it "makes no sense" to require an employee to pursue administrative procedures when the union rather than the individual determines whether to pursue arbitration and review by the FLRA. That contention is fundamentally inconsistent with Congress's decision to rely on collective bargaining and the

familiar procedure of arbitration for resolving disputes involving employees covered by a CBA. Even pursuit of the grievance procedures alone (which is wholly within the power of the employee) advances valid interests in permitting an agency to correct its mistakes and resolving disputes efficiently before further proceedings are triggered. There is, moreover, nothing in the record to suggest that petitioner's union would have been anything less than vigorous in pressing a meritorious grievance through arbitration and the FLRA if necessary. Indeed, the union itself might be in a position to determine whether petitioner's experience reflected broader problems in the agency's implementation of random drug testing (and the union might have been able to approximate the relief petitioner sought by polling its members). And a union that fails to pursue a grievance risks an unfair labor practice charge for violation of its duty of fair representation. See *Karahalios*, 489 U.S. at 531-532.[18]

[18] Petitioner asserts (Br. 41, 44) that the issue of exhaustion is not before this Court because it was not passed on below and because the government purportedly forfeited the argument by not raising it below. As in *Thunder Basin*, however, the government's principal argument throughout this case has been that a suit directly in district court, bypassing the CSRA's comprehensive remedial scheme, is precluded.

Moreover, a respondent in this Court is "entitled * * * to defend the judgment on any ground supported by the record." *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997); *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982). The district court concluded that judicial review was barred in part because petitioner failed to exhaust administrative remedies. Pet. App. 14a & n.17. It was petitioner who then appealed, and circuit precedent squarely supported the preclusion of his district court suit raising both statutory and constitutional claims. It was not until his certiorari petition in this Court that petitioner first argued that the Constitution required an avenue for judicial review of constitutional claims. In response, we argued in our brief at the petition stage (at 23-26) that petitioner first was required to present his grievance in the administrative process. Petitioner did not argue in his reply brief at the petition stage that the government had forfeited any such argument, and he thereby forfeited that objection. Cf. Sup. Ct. R. 15.2. Furthermore, the parties have fully briefed the issue, and the question whether petitioner must present his grievance through

C. The CSRA Would Not Preclude Judicial Review Of A Constitutional Claim For Equitable Relief That Remained At The End Of The CSRA Review Process

Petitioner's failure to present his claim through the grievance procedures is a sufficient basis to affirm the judgment below, and thereby avoid definitive resolution of the difficult question of the proper judicial forum for such claims. In our view, however, the presumption in favor of judicial review would ensure a forum for properly exhausted constitutional claims.

1. Mindful of the "respective costs and benefits" of federal personnel related litigation, *Bush*, 462 U.S. at 388, Congress created a remedial scheme that focused on the practical effects of various actions on workers, and provided more elaborate procedural protections for actions with particularly serious consequences. *E.g.*, *Pinar*, 747 F.2d at 907. Congress afforded considerable protections to employees who are subject to a "major adverse action" or to a "personnel action" on prohibited grounds, and defined both of those terms quite broadly to encompass all of what it regarded as actions and injuries sufficiently concrete and serious to warrant specific safeguards. The formal administrative and judicial review Congress afforded under the CSRA furnishes considerably more protection to employees than the previous scheme. See S. Rep. No. 969, at 46; see also *Leefer* v. *Administrator, NASA*, 543 F.2d 209, 210 n.4 (D.C. Cir. 1976) (noting that employees were not eligible even for administrative review for suspensions of 30 days or less). The CSRA reflects Congress's categorical judgment, after nearly a century of experience in providing protection to civil-service employees, that occurrences that do not constitute "major adverse actions" or

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the CSRA's comprehensive remedial scheme is "a 'predicate to an intelligent resolution' of" whether the CSRA precludes review of constitutional claims. *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); cf. *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005).

"personnel actions" generally do not require a formal legal process that includes judicial review.

Congress legitimately could conclude that the standards and remedies explicitly provided by the CSRA would ordinarily be adequate, and that other personnel matters are not likely to merit judicial, as opposed to administrative, review. That judgment is entitled to respect by the courts, in light of "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'" such as employment. *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974) (quoting *Cafeteria Workers Union* v. *McElroy*, 367 U.S. 886, 896 (1961)); accord *Cornelius* v. *NAACP Legal Def. Fund, Inc.*, 473 U.S. 788, 805 (1985); *Walters* v. *Radiation Survivors*, 473 U.S. 305, 319-320 (1985); *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).

Minor disputes arising out of the day-to-day frustrations and frictions of the workplace—over such things as individual work assignments, offhand comments, work-station location —even if allegedly based on unconstitutional motives or framed in terms of due process or property rights, ordinarily do not rise to the level of a violation of constitutional or legal rights, and do not warrant review by federal courts. Cf. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 787-788 (1998) (noting that Title VII does not apply to "the ordinary tribulations of the workplace, such as the sporadic use of abusive language"). The federal workplace could not function if such minor events routinely became the subject of constitutional adjudication. Particularly in the context of equitable actions of the sort at issue here, there is a long tradition of "withholding * * * relief" in cases of limited import, in "recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer." *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 350-351 (1951); accord *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716-718 (1996).

2. It remains possible, however, that an action could be taken by an agency with respect to one of its employees that would be outside of the definition of "major adverse action" or "personnel action" and yet rise to the level of constitutional significance. See *Bush*, 462 U.S. at 385 n.28 ("certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as 'personnel actions' within the statutory scheme"). A claim concerning drug testing could rise to that level. If a claim concerning such an action were not satisfactorily resolved through the CSRA's administrative processes, and if judicial review were not otherwise available through the CSRA's comprehensive scheme, the structure of the CSRA would not be a sufficient basis to overcome the presumption in favor of judicial review of constitutional claims.

This Court has stated that a "'serious constitutional question' * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Michigan Acad.*, 476 U.S. at 681 n.12). "[I]n part to avoid * * * [such] question[s]," *ibid.*, this Court has adopted a strong presumption against construing statutes to preclude all judicial review of such claims. While the Court will find Congress has foreclosed judicial review of statutory claims if that intent is "fairly discernible" by implication from the statutory structure and language, *Fausto*, 484 U.S. at 452, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Demore* v. *Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster*, 486 U.S. at 603); accord *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977) (stating that Congress's intent must be "manifested by 'clear and convincing evidence'").

The language of the CSRA does not appear to meet the "heightened showing," *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims. While the CSRA's preclusion of judicial review of statutory grievance

claims is "fairly discernable" (*Fausto*, 484 U.S. at 452), the CSRA does not, with the requisite clarity, foreclose judicial review of the limited class of constitutional claims that are not resolved through the administrative process.[19]

3. Although the presumption in favor of judicial review of constitutional claims would appear to ensure a judicial forum, the question of which forum—district court or court of appeals—is more difficult. The structure of the CSRA strongly favors review in the courts of appeals. This Court, moreover, has recognized and applied in the federal employment context a presumption in favor of appellate court review for similar claims. *Lindahl*, 470 U.S. at 797. The language of the applicable judicial review provision, however, does not easily accommodate appeals, presumably because Congress did not avert to this problem directly. Section 7123 includes language that permits "[a]ny person aggrieved by any final order of the [FLRA]" to seek judicial review in either the D.C. Circuit or a regional court of appeals. 5 U.S.C. 7123(a)(1). However, Section 7123(a)(1) goes on to except from that authorization FLRA orders "involving an award by an arbitrator" (other than orders involving an unfair labor practice under 5 U.S.C. 7118). That language would appear to exclude arbitrated claims, even when they involve constitutional claims. The presumption in favor of judicial review of constitutional claims, however, may be sufficiently strong to support reading in a limit to the exception for constitutional claims. Cf. *U.S. Dep't of the Treasury* v. *FLRA*, 43 F.3d 682, 689 & n.9 (D.C. Cir. 1995) (construing Section 7123 not to bar review by court of appeals of certain FLRA decisions involv-

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[19] Compare *Demore*, 538 U.S. at 516-517 (holding that statute providing that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review," and that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien," did not bar an alien's constitutional challenge to "the statutory framework that permits his detention without bail").

ing arbitration, including where constitutional issue was decided by FLRA); contra *NTEU* v. *FLRA*, 112 F.3d 402, 405 (9th Cir. 1997) (disagreeing with *Treasury* v. *FLRA* that Section 7123 preserved judicial review of statutory issue); cf. *Griffith* v. *FLRA*, 842 F.2d 487, 494-495 (D.C. Cir. 1988) (although 5 U.S.C. 7122 and 7123 precluded judicial review of statutory claims, CSRA did not preclude district court challenge to FLRA decision on procedural due process grounds).

The alternative of allowing district court review of such claims is perhaps more straightforward, but it is difficult to reconcile with the structure of the CSRA or the presumption in favor of appellate review of agency action recognized in *Lindahl*, 470 U.S. at 797. As this Court has recognized, one of Congress's principal goals in enacting the CSRA was to address "dissatisfaction" with district court review of federal employment claims, which resulted both in "wide variations in the kinds of decisions . . . issued on the same or similar matters" and "wasteful and irrational" duplicative judicial review by both the district court and the court of appeals. *Fausto*, 484 U.S. at 445. For that reason, Congress centralized judicial review of most major adverse actions and prohibited personnel practice claims in the Federal Circuit, and provided for review of FLRA decisions in other courts of appeals, 5 U.S.C. 7123(b). This Court has consistently resisted constructions of the CSRA that would add "an 'unnecessary layer of judicial review' in lower federal courts," or undermine Congress's efforts to "[e]ncourage[] more consistent judicial decisions" by centralizing review in the courts of appeals. *Fausto*, 484 U.S. at 449; accord *Lindahl*, 470 U.S. at 797. Although it is a close question, a reading of Section 7123 that allows judicial review in the court of appeals is more consistent with the structure of the CSRA.[20]

[20] Even if petitioner were correct that constitutional challenges such as his should be heard in district court, that review should be limited to the agency record rather than de novo. "[T]he focal point for judicial review should be the

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam)).

APPENDIX

1. Title 5 U.S.C. of the United States Codes provides in pertinent part:

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel

systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected—

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court

the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction

of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

2. Human Resource Management, FAA, *FAA Personnel Management System—Introduction* (visited Oct. 11, 2005) <http://faa.gov/ahr/policy/pms/pmsintro. htm> provides in pertinent part:

* * * * *

VII. MERIT PRINCIPLES

The FAA personnel management system shall be implemented consistent with the following merit system principles:

• (a) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society; selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition, which assures that all receive equal opportunity.

• (b) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, sexual orientation, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

• (c) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector; appropriate incentives and recognition should be provided for excellence in performance.

• (d) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

• (e) The Federal workforce should be used efficiently and effectively.

• (f) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

• (g) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

• (h) Employees should be:

o(i) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes; and

o (ii) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

• (i) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences:

o (i) a violation of any law, rule, or regulation; or

o (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

VIII. PROHIBITED PERSONNEL PRACTICES

• (a) Any FAA employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority:

o (i) discriminate for or against any employee or applicant for employment, on the basis of:

- race, color, religion. sex, or national origin, as prohibited under Section 717 of the Civil Rights Acts of 1964 (42 U.S.C. 2000e-16);

- age, as prohibited under Sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

- sex, as prohibited under Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d));

- handicapping condition, as prohibited under Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

- marital status, sexual orientation, or political affiliation, as prohibited under any law, rule, or regulation;

o (ii) coerce the political activity of any person (including the providing of any political contribution or service) or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

o (iii) deceive or willfully obstruct any person to withdraw with respect to such person's right to compete for employment;

o (iv) influence any person to withdrawal from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

- (v) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

- (vi) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of:

  - any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences: a violation of any law, rule or regulation; gross mismanagement, a gross waste of funds, an abuse of authority; or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

  - any disclosure to the Special Counsel or to the Inspector General of an agency, or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

- (vii) to take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of:

  - the exercise of any appeal, complaint, or grievance right granted by law, rule, or regulation;

  - testifying for or otherwise lawfully assisting of any individual in the exercise of any right referred to in subparagraph VIII (a);

  - cooperating with or disclosing information to the Inspector General of any agency, or the Special Counsel, in accordance with applicable provision of the law; or

  - for refusing to obey an order that would require the individual to violate a law;

- (viii) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account, in determining suitability or fitness, any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or the United States; or

- (ix) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation, implementing or

directly concerning, the merit system principles contained in this paragraph.

• (b) Paragraph VIII (a) shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

○ (i) The head of each line of business or staff organization shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of a line of business or staff organization delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

○ (ii) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to employee or applicant for employment in the civil service under:

■ Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

■ Sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

- Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d)), prohibiting discrimination on the basis of sex;

- Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

- the provision of any law, rule, or regulation prohibiting discrimination on the basis of marital status, sexual orientation, or political affiliation.

Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1131

TERRY L. WHITMAN, PETITIONER *v.* DEPARTMENT OF TRANSPORTATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 5, 2006]

PER CURIAM.

Terry Whitman, the petitioner, is an employee of the Federal Aviation Administration (FAA) and is subject to the agency's drug and alcohol testing program. Without first seeking to pursue grievance procedures under his collective-bargaining agreement, he filed suit in the United States District Court for the District of Alaska, alleging the FAA tested him in a nonrandom manner, in violation of his constitutional rights and 49 U. S. C. §45104(8).

The FAA has its own procedural framework for the resolution of claims by its employees; and for this purpose it adopts certain sections of the Civil Service Reform Act of 1978 (CSRA), including Chapter 71 of Title 5, which sets forth the rules for grievances. 49 U. S. C. §40122(g)(2)(C). The District Court held that, under the provisions of the CSRA, it was without jurisdiction to consider the petitioner's claims. The Court of Appeals for the Ninth Circuit affirmed, stating that because "5 U. S. C. §7121(a)(1), as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by

the negotiated grievance procedures of federal employees' collective bargaining agreements," his claims are precluded. 382 F. 3d 938, 939 (2004). This Court granted certiorari to review the judgment. 545 U. S. ___ (2005).

The Court of Appeals was correct to say that 5 U. S. C. §7121(a)(1) does not confer jurisdiction. Another statute, however—a very familiar one—grants jurisdiction to the federal courts over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. §1331. The question, then, is not whether 5 U. S. C. §7121 confers jurisdiction, but whether §7121 (or the CSRA as a whole) removes the jurisdiction given to the federal courts, see *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 642 (2002) (holding that "even if [47 U. S. C.] §252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U. S. C. §1331 to review the Commission's order for compliance with federal law"), or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA, cf. *United States* v. *Fausto*, 484 U. S. 439, 443–444 (1988); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) ("The question is phrased in terms of 'prohibition' rather than 'authorization' because . . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

In deciding the question of jurisdiction and preclusion, the Court would be required first to ascertain where Whitman's claims fit within the statutory scheme, as the CSRA provides different treatment for grievances depending on the nature of the claim. It may be, for example, that the FAA's actions, as described by the petitioner, constitute a "prohibited personnel practice." See 5 U. S. C. §2302(b); 49 U. S. C. §40122(g)(2)(A). Both the petitioner and the Government say they do not, but because the ultimate question may be jurisdictional, this concession ought not

to be accepted out of hand. See *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U. S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only Congress can do so"). The Court of Appeals did not decide whether the petitioner's allegations state a "prohibited personnel practice." The proper course, then, is to remand for the Court of Appeals to address the matter, see *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999), as well as the ultimate issue of preclusion. The various other issues raised before this Court, but not decided below, may also be addressed on remand, including: whether the petitioner has challenged final agency action; whether the petitioner has exhausted his administrative remedies; whether exhaustion is required given this statutory scheme and the Administrative Procedure Act, as interpreted in *Darby* v. *Cisneros*, 509 U. S. 137 (1993); and whether the Government has forfeited its exhaustion-of-remedies argument. It may be that a decision on these questions can obviate the need to decide a more difficult question of preclusion.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.